(17,359.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 257.

COLUMBUS WINCHESTER MOTES, ALIAS CHESS MOTES, ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

INDEX.

	Original.	Print.
Indictment	1	1
Notice to defendants of setting case for trial, &c.	7	7
List of witnesses	7	7
Special venire	8	8
Regular venire	9	9
Marshal's return	10	10
Motion in arrest of judgment	11	10
Motion for new trial	12	11
Petition for writ of error	13	12
Motion for new trial	15	13
Bill of exceptions	16	14
Statement of proceedings	16	14
Statement of evidence	18	15
Testimony of H. A. Wilson	23	18
Testimony of Wm. Robert Taylor	25	19
Further statement of evidence	32	24
Testimony of Columbus W. Motes	34	25
Defendant's requests to charge	37	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 27, 1900.

	Original.	Print
Motion in arrest of judgment	40	28
Judge's certificate to bill of exceptions	41	29
Arraignment and pleas	42	29
Order for special venire, &c.	43	30
Order allowing witnesses under section 878, Revised Statutes	45	31
Return of special venire	46	32
Order excusing certain jurors	47	33
Order as to manner of drawing jurors, &c.	47	33
Order excusing certain jurors	50	35
Order beginning trial	50	35
Order continuing trial, &c.	51	35
Order on marshal to furnish dinner to jury	51	35
Order concluding trial	52	36
Verdict	53	36
Judgment	53	37
Order allowing writ of error	54	37
Order denying motion to stay execution	55	37
Order granting motion for stay	55	38
Order granting time to file bill of exceptions	56	38
Order continuing motion for new trial	57	38
Copy of writ of error	58	38
Copy of citation	59	40
Clerk's certificate	60	40

1 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, September Term, 1898.

The grand jurors of the United States, duly elected, empannelled, sworn, and charged according to law to inquire for the body of the said southern division of the northern district of Alabama, upon their oaths present:

1st. That heretofore, to wit, on the 14th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, in the said southern division of the northern district of Alabama, before the finding of this indictment, and within the jurisdiction of said court, in the county of Talladega, in the State of Alabama, Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did conspire to injure, oppress, threaten, and intimidate one W. A. Thompson—whose Christian name is to the said grand jurors otherwise unknown—a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he, the said W. A. Thompson, had on, to wit, about the 2nd day of October, eighteen hundred and ninety-seven, reported and informed one Robert A. Moseley, a United States commissioner in and for the northern district of Alabama, that Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson, and Walter Motes had on, to wit, about the months of July, August, September, October, November, and December, in the year eighteen hundred and ninety-five, violated the internal-revenue laws of the United States by unlawfully carrying on the business of distillers without having given bond, as required by law, and having in their possession and custody and under their control a still and distilling apparatus, set up without having the same registered, as required by law; and the conspiracy hereinbefore charged was formed by the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, for the purpose of injuring, oppressing, threatening, and intimidating the said W. A. Thompson, a citizen of the United States, as aforesaid, because of his having exercised his said rights and privileges secured to him as aforesaid in reporting and informing the said Robert A. Moseley, a United States commissioner as aforesaid, of the violation of the internal-revenue laws of the United States, as aforesaid, by the said Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson, and Walter Motes, and in the furtherance of said conspiracy so formed and for the purpose aforesaid and to effect the object thereof the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship,

alias Dodge Blankenship, alias Dodger Blankenship, did on, to wit, about the 14th day of March, eighteen hundred and ninety-eight, go upon the highway and did then and there, in the county of Talladega, in the State of Alabama, in the southern division of the northern district of Alabama, and within the jurisdiction of said court, unlawfully, wilfully, premeditatedly, deliberately, and with malice aforethought kill and murder the said W. A. Thompson by shooting him with a gun or guns, because he, the said W. A. Thompson, had reported to the said Robert A. Moseley, 2 United States commissioner as aforesaid, said violation of the internal-revenue laws of the United States by the said Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson, and Walter Motes, as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

2nd. And the grand jurors aforesaid upon their oaths aforesaid do further present that at the time and place aforesaid and within the jurisdiction aforesaid the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did conspire to injure, oppress, threaten, and intimidate one W. A. Thompson, whose Christian name is to the said grand jurors otherwise unknown, a citizen of the United States, because of his having exercised a right and privilege secured to him by the Constitution and laws of the United States, to wit, because the said W. A. Thompson had on, to wit, about the 2nd day of October, eighteen hundred and ninety-seven, reported and informed one Robert A. Moseley, a United States commissioner in and for the northern district of Alabama, that Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson, and Walter Motes did at divers times during the year eighteen hundred and ninety-five violate the internal-revenue laws of the United States by unlawfully carrying on the business of distillers without having given bond as required by law, and did have in their possession and custody and under their control a still and distilling apparatus set up without having the same registered as required by law, and in forming the said conspiracy as aforesaid, and thereby violating the statute in such case made and provided; and in furtherance of said conspiracy so formed for the purpose aforesaid and to effect the object thereof, the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did at the time and place aforesaid and within the jurisdiction aforesaid unlawfully, wilfully, premeditatedly, deliberately, and with malice aforethought kill the said W. A. Thompson by shooting him with guns, because he, the said W. A. Thompson, had exercised the right and privilege aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

3rd. And the grand jurors aforesaid upon their oaths aforesaid do further present that at the time and place aforesaid and within

the jurisdiction aforesaid the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did conspire to injure, oppress, threaten, and intimidate one W. A. Thompson, whose Christian name is to the said grand jurors otherwise unknown, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he, the said W. A. Thompson, had on, to wit, about the 8th day of March, 1898, informed one William C. Hanlin, a deputy collector of internal revenue of the United States in the southern division of the northern district of Alabama, that said Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, and one Smith, whose Christian name is to the grand jurors unknown, did on or about the 8th day of March, 1898, violate the internal-revenue laws of the United States by unlawfully carrying on the business of distillers without having given bond as required by law, and the conspiracy hereinbefore charged was formed by the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, for the purpose of injuring, oppressing, threatening, and intimidating the said W. A. Thompson because of his having exercised his said right and privilege, secured to him as aforesaid, in reporting to and informing said William C. Hanlin, deputy collector of internal revenue for the United States as aforesaid, of said violation of the internal-revenue laws of the United States as aforesaid, and for the purpose aforesaid, and to effect the object of the said conspiracy above charged, the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did, at the time and place aforesaid and within the jurisdiction aforesaid, go upon the highway, and did then and there, unlawfully, wilfully, premeditatedly, deliberately, and with malice aforethought, kill and murder the said W. A. Thompson by shooting him with a gun, because he, the said W. A. Thompson, had reported to and informed the said William C. Hamlin, deputy collector of internal revenue as aforesaid, — said violation of the internal-revenue laws of the United States by the said Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, and one Smith, whose Christian name is to the grand jurors unknown as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

3

4th. And the grand jurors aforesaid upon their oaths aforesaid do further present that at the time and place aforesaid and within the jurisdiction aforesaid the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias

Dodge Blankenship, alias Dodger Blankenship, did conspire to injure, oppress, threaten, and intimidate one W. A. Thompson, whose Christian name is to the grand jurors otherwise unknown, a citizen of the United States, because of his having freely exercised a right and privilege secured to him by the Constitution and laws of the United States, in that he, the said W. A. Thompson, on or about the 8th day of March, 1898, had reported to and informed one William C. Hanlin, a deputy collector of internal revenue for the United States in the southern division of the northern district of Alabama, that said Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, and one Smith, whose Christian name is to the grand jurors unknown, did on, to wit, about the 8th day of March, 1898, violate the internal-revenue laws of the United States, by unlawfully carrying on the business os distillers without having given bond as required by law, and in the act of forming said conspiracy above charged, and thereby violating the provisions of the statute in such case made and provided, and for the purpose aforesaid and in furtherance of the said conspiracy, and to effect the object thereof, and because the said W. A. Thompson had so exercised his said right as aforesaid, the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did, at the time and place aforesaid and within the jurisdiction aforesaid, unlawfully, wilfully, premeditatedly, deliberately, and with malice aforethought kill the said W. A. Thompson by shooting him
4 with a gun, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

5th. The grand jurors aforesaid upon their oaths aforesaid do further present that on, to wit, about the 14th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, within the jurisdiction aforesaid, in the county of Talladega, in the State of Alabama, Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did conspire to injure, oppress, threaten, and intimidate W. A. Thompson, whose Christian name is to the grand jurors otherwise unknown, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and because of his — exercised the same, in that he, the said W. A. Thompson, had on, to wit, about the month of November, 1897, reported to and informed the grand jurors of the United States elected, empannelled, sworn, and charged to enquire for the body of the southern division of the northern district of Alabama, in the city of Birmingham, county of Jefferson, State of Alabama, that Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson, and Walter Motes did on, to wit, about the months of July, August, September, October, November, and December, 1895, in the county of Talladega, State of Alabama, in the southern division of the northern district

of Alabama, and within the jurisdiction of this court, violate the internal-revenue laws of the United States by unlawfully carrying on the business of distillers without having given bond, as required by law, and did have in their custody and under their control a still and distilling apparatus set up without having the same registered, as required by law, and the conspiracy hereinbefore charged was formed by the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, for the purpose of injuring, oppressing, threatening, and intimidating the said W. A. Thompson, a citizen of the United States, because of his having exercised his said rights and privileges secured to him, as aforesaid, in reporting and informing the grand jurors aforesaid of the violation of the internal-revenue laws of the United States, as aforesaid, and in furtherance of the conspiracy so formed and for the purpose aforesaid and to effect the object thereof the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did on, to wit, about the 14th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, go upon the highway and did then and there, at the time and place aforesaid, unlawfully, willfully, premeditatedly, deliberately, and with malice aforethought kill and murder the said W. A. Thompson by shooting him with a gun because he, the said W. A. Thompson, had reported to and informed the said grand jurors of the United States, as aforesaid, of the violation of the internal-revenue laws of the United States, as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

5 6th. And the grand jurors aforesaid upon their oaths aforesaid do further present that at the time and place aforesaid and within the jurisdiction aforesaid the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankinship, did conspire to injure, oppress, threaten, and intimidate one W. A. Thompson, whose Christian name is to the grand jurors otherwise unknown, a citizen of the United States, because of his having freely exercised a right and privilege secured to him by the Constitution and laws of the United States, in that he, the said W. A. Thompson, had during the month of November, 1897, appeared as a witness before the grand jury of the United States for the southern division of the northern district of Alabama and informed the grand jury aforesaid of certain violations of the internal-revenue laws of the United States by Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson, and Walter Motes in carrying on the business of distillers without having given bond, as required by law, and in the act of forming the said conspiracy and thereby violating the provision of the statute in such case made and provided and for the purpose aforesaid of

injuring, oppressing, threatening, and intimidating the said W. A. Thompson because of his having so exercised said right and privilege, and in furtherance of said conspiracy and to effect the object thereof the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, at the time and place aforesaid and within the jurisdiction of said court did then and there unlawfully, willfully, premeditatedly, deliberately, and with malice aforethought kill the said W. A. Thompson by shooting him with a gun, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

7th. And the grand jurors aforesaid do further present that on the 14th day of March, 1898, in the southern division of the northern district of Alabama, before the finding of this indictment and within the jurisdiction of said court, in the county of Talladega, Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did conspire to injure, oppress, threaten, and intimidate one W. A. Thompson, whose Christian name is to the grand jurors otherwise unknown, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he, the said W. A. Thompson, had on, to wit, about the 12th day of March, 1898, appeared before the United States district court for the southern division of the northern district of Alabama, at Birmingham, Alabama, as a witness, in obedience to a subpœna theretofore served on him to appear therein as a witness in the case of The United States against Ben Morris, the same being numbered 1370 on the docket of said court, and in which case the said Ben Morris was charged with and indicted for carrying on the business of a distiller without having given bond as required by law, and the conspiracy hereinbefore charged was formed by the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge ——, alias Dodger Blanken-
6 ship, for the purpose of injuring, oppressing, threatening, and intimidating the said W. A. Thompson because of his having exercised his said right and privilege secured to him, as aforesaid, in reporting and appearing in the said United States district court on the 12th day of March, 1898, as aforesaid, as a witness for the Government of the United States, duly and legally subpœnaed so to appear in the said case of the United States against Ben Morris, and for the purpose aforesaid and to effect the object thereof the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, did on, to wit, in the county of Talladega, in the State of Alabama, in the southern division of the northern district of Alabama, and within the jurisdiction of the said court, unlawfully, willfully, pre-

meditatedly, deliberately, and with malice aforethought kill and murder the said W. A. Thompson by shooting him with a gun, because he, the said W. A. Thompson, had exercised his said right secured to him as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

WILLIAM VAUGHAN,
United States Attorney.

A true bill.
BEN WEIL,
Foreman of Grand Jury.

Filed September 13th, 1898.

N. W. TRIMBLE, *Clerk.*
WILLIAM VAUGHAN,
U. S. Attorney.

Witnesses: Bob Taylor, Jesse Phillips, B. W. Bell.

Violation sec. 5508 R. S.

7 In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, September Term, 1898.

THE UNITED STATES
vs.
COLUMBUS WINCHESTER MOTES, alias CHESS MOTES; WALTER W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship.

To the defendants in the above cause:

You are hereby notified that the above case is set for trial on the 20th day of September, 1898, and the following witnesses will be produced on the trial for the purpose of proving the indictment, and each of said witnesses resides and his place of abode is at the place set opposite his said name:

Robert A. Mosely, Birmingham, Jefferson Co.
William C. Hanlin, Woodlawn, Jefferson Co., Ala.
Sam. M. Hamby, Birmingham, Jefferson county, Ala.
Edward T. Broadway, Birmingham, Jefferson county, Ala.
Anderson Brooks Mitchell, Childersburg, Talladega Co., Ala.
Cornelia E. Thompson, Sylacauga, Talladega Co., Ala.
Leander L. Thompson, Sylacauga, Talladega Co., Ala.
Tolley Thompson, Sylacauga, Talladega, Ala.
Daniel M. Thompson, Weogufka, Coosa county, Ala.
Mrs. Ellen Hyde, Fayetteville, Talladega, Alabama.
Mrs. Mary Taylor, Fayetteville, Talladega Co., Ala.
Cobb Morris, Fayetteville, Talladega Co., Ala.
Jesse Phillips, Sylacauga, Talladega Co., Ala.
James H. Lane, Sylacauga, Talladega Co., Ala.

Dr. J. E. Pierson, Sylacauga, Talladega Co., Ala.
Benjamin B. Morris, Fayetteville, Talladega Co., Ala.
Tom Motes, Fayetteville, Talladega Co., Ala.
Ad Smith, Weogufka, Coosa Co., Ala.
Levi Butler, Fayetteville, Talladege Co., Ala.
Matt Burks, Weogufka, Coosa county, Ala.
Susie Burks, Weogufka, Coosa county, Ala.
Jim Green, Weogufka, Coosa county, Ala.
Tom White, Sylacauga, Talladega Co., Ala.
Henry Blackmon, Sylacauga, Talladega Co., Ala.
Willie Hughes, Woegufka, Coosa Co., Ala.
Mrs. Kate Wallace, Sylacauga, *Coosa* Co., Ala.
Jim Wallace, Sylacauga, Talladega Co., Ala.
J. F. Martin, alias Squire Martin, Sylacauga, Talladega Co., Ala.
Tink Morris, Fayetteville, Talladega Co., Ala.
Bushrod W. Bell, Montgomery, Montgomery Co., Ala.
William Robert Taylor, Fayetteville, Talladega Co., Ala.
Ed May, Sylacauga, Talladega Co., Ala.

You are hereby further notified that the following jurors compose the special venire from which, together with the regular venire, a jury will be drawn to try said case; the said jurors reside and their place of abode are the places the names of which appear opposite the names of the jurors:

8 *Special Venire.*

R. C. Rector, Vernon, Lamar county.
James C. Knight, Hurley, Cherokee county.
Mack Cumming, c., Gadsden, Etowah county.
J. F. McNeal, Sloen, Blount county.
Hope Hargrove, Cottondale, Tuscaloosa county.
Noah McGhee, Centre, Cherokee county.
George P. Jones, Aldrich, Shelby county.
John Trimble, Bodka P. O., Sumter county.
William Allen, Woodstock, Bibb county.
Charles A. Vildabill, Avondale, Jefferson county.
Thomas Y. Daniels, Taff, Cherokee county.
S. A. Ryland, Adville, Blount county.
W. H. McElrath, Spring Garden, Cherokee county.
Henry P. Stewart, c., Piedmont, Calhoun county.
William Leonard, c., Pleasant Ridge, Green county.
J. E. James, Jamesville, Bibb county.
John Inge, c., Ramsey, Sumter county.
Zack Story, c., Mantau, Greene county.
Marcus T. Martin, Anniston, Calhoun county.
Nick Carnes, Oneonta, Blount county.
J. E. Ruffin, Helena, Shelby county.
Owen Nealy, c., Ashville, St. Clair county.
James Donovan, Birmingham, Jefferson county.
John M. Satterfield, Birmingham, Jefferson county.
Sidney W. Lee, Birmingham, Jefferson county.

Charles W. Frobus, Birmingham, Jefferson county.
W. H. Shepherd, Berry Station, Fayette county.
W. R. Hall, c., Horse Creek, Walker county.
George Washington, c., Birmingham, Jefferson county.
Joseph C. Lindsay, c., Anniston, Calhoun county.
R. H. Hudson, Coalberg, Jefferson county.
C. W. Ewing, Gadsden, Etowah county.
John McGee, c., Bangor, Blount county.
C. J. Geary, Eutaw, Greene county.
Rhodes H. Alston, c., Galera, Shelby county.

9 You are hereby further notified that the following persons compose the regular venire, the places of abode of whom are set opposite their names:

Regular Venire.

Elijah Smoot, Hamner P. O., Sumter county, Alabama.
James D. Hilton, Carbon Hill, Walker county, Alabama.
Benjamin F. Ginnings, Rock Run, Cherokee county, Alabama.
T. B. Garren, Tidmore, Blount county, Alabama.
Sam. Gilmore, Columbiana, Shelby county, Alabama.
George W. Phillips, Wynville, Blount county, Alabama.
Frank N. Jeffries, Fayette, Fayette county, Alabama.
John P. Clements, North Port, Tuscaloosa county, Alabama.
Monroe McAnally, Blount Springs, Blount county, Alabama.
Columbus C. Files, Hugent, Fayette county, Alabama.
Porter G. Pendergrass, Fort Payne, De Kalb county, Alabama.
Richard Kemp, Birmingham, Jefferson county, Alabama.
Joe Lawrence, Gadsden, Etowah county, Alabama.
James H. Morrow, Trussville, Jefferson county, Alabama.
W. Spencer Jack, Stuart's Station, Hale county, Alabama.
W. R. Lollar, Sr., Oregonia, Tuscaloosa county, Alabama.
George D. Fowler, Liberty, Blount county, Alabama.
William H. Hunter, Birmingham, Jefferson county, Alabama.
Jackson A. Burgess, Weavers, Calhoun county, Alabama.
Frank H. Hamilton, Birmingham, Jefferson county, Alabama.
Benjamin F. Wilson, Round Mountain P. O., Cherokee county, Alabama.
Dempsey Winn, Livingston, Sumter county, Alabama.
Newton J. Stephens, Calvin's Gap, Calhoun county, Alabama.
Henry W. Fowlkes, Birmingham, Jefferson county, Alabama.
George Flemming, Lawrence Station, Cherokee county, Alabama.
Samuel Snoddy, Jasper, Walker county, Alabama.
William H. Bryan, Birmingham, Jefferson county, Alabama.
Marshall R. Murphy, Oneonta, Blount county, Alabama.
James Moore, Tuscaloosa, Tuscaloosa county, Alabama.
John McCoy, Birmingham, Jefferson county, Alabama.

You are hereby further notified that a correct copy of the indictment against you in this cause is hereby served on you.

WILLIAM VAUGHAN,
United States Attorney.

10 *Marshal's Return.*

Filed in marshal's office Sept. 15th, 1898.

I hereby certify that I delivered to and left with the following-named defenda-ts, to wit, Walter W. Motes, Columbus Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, a true attested copy of the with- notice list of juro-s this 15th day of Sept., 1898.

Received in marshal's office this the 15th day of Sept., 1898.

____ ____,
U. S. Marshal.

I have executed the within papers by serving on each of the said defendants, Columbus Winchester Motes, alias Chess Motes: Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge, alias Dodger Blankenship, a true and attested copy of the within notice, signed by the U. S. attorney, including a list of the witnesses to be produced on the trial, together with the places of abode; a list of the special venire heretofore drawn for the trial of this case, the regular venire, and special juries, on this 15th day of Sept., 1898.

D. N. COOPER, *U. S. M.*,
By J. L. WHITE, *Office Deputy.*

$12.00.

Returned and filed Sept. 15, 1898.

N. W. TRIMBLE, *Clerk.*

11 *Motion in Arrest of Judgment.*

In the Circuit Court of the United States, Sou. Div., Nor. District of Alabama.

THE UNITED STATES }
—
WALTER W. MOTES ET ALS. }

Now comes the defendants in above case after the rendition of the verdict of the jury finding them guilty as charged in the indictment and before judgment and sentence, and moves the court to arrest the judgment in this case upon the ground that said indictment charges the defendants in each count thereof with two separate and distinct offenses not of the same class.

2nd: That said indictment charges the defendants with two separate and distinct offenses, viz: Said indictment charges the defendants with conspiracy, in violation of section 5508 of the Revised Statute of the United States, which prescribes a punishment of not more than 10 years' imprisonment, and in the same count, in each and every count of said indictment, the defendants are charged

with murder in the first degree, which offense is not of the same class as the other offense charged in the indictment.

LEE COWART,
Att'y for Def'ts.

Filed Oct. 4th, 1898.

N. W. TRIMBLE, *Clerk.*

12 In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

UNITED STATES
vs.
WALTER W. MOTES ET ALS.

Now come the defendants in the above case and moves the court to set aside the verdict of the jury and grant a new trial to the defendants upon the following grounds, to wit:

1st.

Because the evidence did not warrant a conviction.

2d.

Because the verdict of the jury was contrary to the evidence.

3d.

Because the verdict of the jury was contrary to the weight of the evidence.

4th.

Because said verdict was rendered by the jury on the evidence of an accomplice and there was no evidence given in said trial as against defendants John Littlejohn, Mark Grant Blankenship, Walter W. Motes, and Jasper Robinson to corroborate the evidence of said accomplice.

5th.

Because the defendants have discovered new evidence since the trial of said case.

6th.

Because the court erred in allowing the testimony of the absent witness Taylor to go before the jury.

7th.

Because the court erred in allowing the testimony of the absent witness Taylor to go before the jury as against Walter W. Motes and Jasper Robinson, the two defendants who were not on trial at the time the testimony of said Taylor was taken before the commissioner.

LEE COWART &
B. F. BERRY,
Att'ys for Defendants.

Filed Oct. 10th, 1898.

N. W. TRIMBLE, *Clerk.*

13 In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

UNITED STATES
vs.
WALTER W. MOTES ET ALS.

To the Hon. John Bruce, judge:

The petition of Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship respectfully shows unto the court that they and each of them were convicted at the present term of this court upon an indictment charging them with conspiracy and murder, and that they have numerous exceptions reserved to the ruling of the court upon the trial of said case and upon motion in arrest of judgment. Wherefore the above-named defendants pray that a writ of error be allowed them, transferring their case to the Supreme Court of the United States, that the said Supreme Court may revise the action of this court in the premises, and petitioners assign as errors the following, viz:

1st. The ruling of the court in the matter of the drawing and organization of the jury.

2d. The ruling of the court in allowing the Government five peremptory challenges.

3d. The ruling of the court in refusing to allow the defendants eleven peremptory challenges each.

4th. The ruling of the court in allowing the testimony of various witnesses for the Government to go before the jury showing the defendants were guilty of illicit distilling and retailing liquor in violation of law.

5th. The ruling of the court in allowing the Government to
14 offer in evidence the still and distilling apparatus said to have been operated by some of these defendants.

6th. The ruling of the court in allowing, against defendants' objection, the testimony of James H. Lane to the effect that defendant Littlejohn had stated to witness that he, Littlejohn, and defendant Blankenship had been running a still together.

7th. The ruling of the court in allowing the jury to examine through the microscope particles of blood and brains said to have been removed from shoes found at the residence of the defendant Columbus W. Motes.

8th. The ruling of the court in allowing the testimony to be read to the jury of the accomplice Taylor taken in preliminary trial of The United States *vs.* Columbus W. Motes, William Robert Taylor, John Littlejohn, and Dodge Blankenship.

9th. The ruling of the court in allowing the testimony of the accomplice Taylor to go before the jury as against Walter W. Motes and Jasper Robinson, the two defendants who waived preliminary examination and were not on trial at the time the testimony of Taylor was taken.

10th. The ruling of the court in refusing the written charges asked by the defendant-.

11th. The ruling of the court in overruling the defendants' motion in arrest of judgment.

12th. The ruling of the court in requiring the defendants, each against his objection, to say whether he had or not been engaged in illicit distilling in violation of law.

WALTER W. MOTES,
COLUMBUS W. MOTES,
JASPER ROBINSON,
MARK GRANT BLANKENSHIP,
JOHN LITTLEJOHN,
By COWART AND BERRY,
Their Att'ys.

Allowed.
JOHN BRUCE, *Judge.*

Filed Oct. 10, 1898.
N. W. TRIMBLE, *Clerk.*

15 In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

UNITED STATES
vs.
WALTER W. MOTES ET ALS.

Now come the defendants in the above-entitled cause and moves the court to set aside the verdict of the jury and grant a new trial to the defendants upon the following grounds, to wit:

1st.

Because the evidence did not warrant a conviction.

2d.

Because the verdict of the jury was contrary to the evidence.

3d.

Because the verdict of the jury was contrary to the weight of the evidence.

4th.

Because said verdict was rendered by the jury on the evidence of an accomplice, and there was no evidence given in said trial as against defendants John Littlejohn, Mark Grant Blankenship, Walter W. Motes, and Jasper Robinson to corroborate the evidence of said accomplice.

5th.

Because the defendants have discovered new evidence since the trial of said case.

6th.

Because the court erred in allowing the testimony of the absent witness Taylor to go before the jury.

7th.

Because the court erred in allowing the testimony of the absent witness Taylor to go before the jury as against Walter W. Motes and Jasper Robinson, the two defendants who were not on trial at the time the testimony of said Taylor was taken before the commissioner.

LEE COWART &
B. F. BERRY,
Att'ys for Defendants.

Filed Oct. 15th, 1898.

N. W. TRIMBLE, *Clerk.*

16 In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, September Term, 1898.

THE UNITED STATES
vs.
WALTER W. MOTES ET ALS.

Be it remembered that the case of The United States *vs.* Walter W. Motes *et als.* coming on to be heard in the circuit court of the United States for the southern division of the northern district of Alabama—Hon. John Bruce, district judge, present and presiding—the following proceedings, among other things not otherwise appearing of record, were had, to wit:

After the defendants had been arraigned and pleaded not guilty it was, on the 14 day of September, 1898, ordered by the court, on motion of the U. S. attorney, that a special venire of thirty-five jurors be summoned, from which, together with the regular venire, a jury should be drawn to try the case, which was accordingly done, and the court ordered a list of the jurors comprising the regular and special venire, with residences of witnesses and jurors, to be served on each defendant at least two days before the day of trial.

The case was set for trial for September 20th, 1898. On that day the court ordered all of the names of all the jurors composing the special venire and also the regular venire placed in a box by the clerk and then and there to be drawn out by the marshal, one name at a time, and the court required the Government to pass on each juror as his name was drawn from the box, and if the juror was challenged by the Government he was excused, and if satisfactory to the Government the defendants were required to pass on
17 each juror as his name was drawn from the box, and if challenged by the defendants he was rejected.

To this manner of drawing and organizing the jury the defendants then and there duly objected on the ground that it was illegal. The court overruled the objection, and the defendants then and there duly excepted to such ruling and action of the court, and now assigns the same as error.

The court held that the Government was entitled to five peremp-

tory challenges, and the defendants twenty peremptory challenges; to which ruling of the court the defendants then and there duly excepted to such ruling of the court and now assigns the same as error.

The defendants, before challenging any juror, by motion to the court, demanded eleven peremptory challenges each; which motion was overruled by the court, and to which ruling of the court the defendants then and there duly excepted and now assigns the same as error. The drawing of the jury was then proceeded with, and the Government challenged peremptorily five jurors and the defendants challenged peremptorily seventeen persons.

After the organization of the jury in the manner above indicated the defendants objected to proceedings with the trial on that day, to wit, September 20, 1898, being the same day the jury was drawn from the special venire and regular venire aforesaid. The court overruled the objection, and the defendants duly then and there excepted to such ruling of the court, and now assigns the same as error.

18 The proof showed that the body of W. A. Thompson was found on the 16th day of March, 1898, on a trail between where the deceased resided and the town of Sylacauga, Ala., about three miles east of where the defendants Walter W. Motes, Columbus W. Motes, William Robert Taylor, and Jasper Robinson resided, and about three miles north of where the defendants John Littlejohn resided, and about eight miles north of where the defendant Blankenship resided; that he had been dead about 48 hours when his body was found, and that three shots had been fired, taking effect, one in his forehead, one in his neck, and one in his stomach, and that through the wound in his forehead part of his brains had exuded.

The proof showed and it was admitted that on the 2d day of October, 1897, W. A. Thompson had reported and informed R. A. Moseley, Jr., a commissioner of the circuit court of the United States for the northern district of Alabama, that Chess and Walter Motes, Ben Morris, Bob Taylor, and Jasper Robinson had in the fall of 1895 violated the internal-revenue laws of the United States; that on the preliminary trial of said defendants before said commissioner, in October, 1897, said W. A. Thompson was a witness for the Government; that all of said defendants were held for trial by said commissioner, and afterwards, at the adjourned September term of the U. S. courts for the southern division of the northern district of Alabama, in November, 1897, the grand jury of said court presented indictments against said defendants; that said Thompson was a witness against all of them before said grand jury; that the cases against the above-named defendants had been continued at the March term, 1898, of the U. S. courts for this division and district, on, to wit, the 12th day of March, 1898; that W. A. Thompson was a witness for the Government, and attended as such at said

19 March term, 1898, and was discharged as such witness for said term on the 12th day of March, 1898.

The proof further showed, and it was admitted, that in February

or March, 1898, said W. A. Thompson had informed one W. C. Hanlin, a deputy collector of internal revenue for the district of Alabama, that the defendant Blankenship was violating the internal-revenue laws of the United States, and that said Hanlin, in company with Deputy Marshal Mitchell and one Phillips, made a raid near said Blankenship's residence and destroyed an illicit distillery, and arrested said Blankenship on a charge of violating the internal-revenue laws of the United States on the 7th day of March, 1898, and that said Thompson was not used as a witness for the Government against said Blankenship.

The defendants then and there objected to the introduction of the proof of the destruction of said illicit still near the house of the defendant Blankenship, and also moved to exclude it from the jury on the grounds, first, that it was irrelevant; second, that it was immaterial; and, third, that it was illegal. The court overruled the objections, and the defendants then and there duly excepted thereto, and now assigns the same as error.

The proof further showed that Blankenship, when he was arrested and afterwards, said that he believed W. A. Thompson reported him for stilling, and that if he did he would kill him if it cost him his life.

The U. S. attorney offered to prove by Mrs. W. A. THOMPSON that in the fall of 1895, in Talladega county, Alabama, she saw the defendants Walter W. Motes, Columbus W. Motes, William Robert Taylor, and Jasper Robinson operating an illicit distillery. To the introduction of this testimony the defendants then and the- duly objected upon the grounds, first, that it was irrele-
20 vant; second, that it was incompetent and tended to prejudice the mind of the jury. The court overruled the objections, and the defendants then and there duly excepted — the ruling of the court, and now assigns the same as error.

The U. S. attorney also showed said witness a still and distilling apparatus set up in the presence of the court and jury, which she identified as the still she saw said defendants operating during the fall of 1895, and after having the same identified by witness the said still and distilling apparatus, including the cap and worm, was offered in evidence by the U. S. attorney. The defendants then and there objected to the introduction of this testimony on the grounds, first, that it was irrelevant; second, that it was incompetent and misleading. The court overruled the objections, and the defendants then and there duly excepted to such ruling of the court, and now assign such as error.

The court allowed the U. S. attorney to set up said still, cap, and worm in the presence of the jury; to which the defendants objected. The objection being overruled by the court, the defendants then and there duly excepted. The court allowed said still and distilling apparatus to remain in the presence of the jury throughout the trial of the case against the objection of the defendants, and the defendants now assign said ruling and action of the court as error.

The United States attorney, by witness B. W. BELL, offered to prove that the still and distilling apparatus offered in evidence was found by him near the dwelling-house of Walter W. Motes, one of the defendants; that said still was not set up and in a condition to be operated, but had been buried in the ground and covered up with boards and dirt. The defendants objected to the introduction
21 of this testimony on the grounds, first, that it was illegal; second, that it was irrelevant; third, that it was immaterial and misleading. The court overruled the objection, and the defendants then and there duly excepted, and now assign the same as error.

The U. S. attorney offered to read to the jury the evidence of William Robert Taylor taken in the preliminary trial before U. S. Commissioner Wilson of the case of The United States *vs.* Columbus W. Motes, William Robert Taylor, John Littlejohn, and Dodge Blankenship, and for the purpose of laying a predicate for offering said testimony he examined Capt. B. W. Bell, who testified that he was a special officer of the department of justice; that he had been engaged in working up the cases against these defendants and preparing them for trial; that in August, 1898, he caused the arrest of said William Robert Taylor and also Columbus W. Motes, John Littlejohn, and Dodge Blankenship on a charge of conspiracy and murder of W. A. Thompson, and that on the 19th day of August, 1898, during and on the second day of their preliminary trial, one of the defendants, William Robert Taylor, voluntarily became a witness for the prosecution, and made a statement implicating in said murder Columbus W. Motes, John Littlejohn, and Dodge Blankenship, who were at that time having their preliminary hearing before said commissioner, and also implicating in said murder Walter W. Motes and Jasper Robinson, who had been brought to said preliminary trial as witnesses for the Government, and that on the second day of said preliminary trial he (Bell) caused the arrest of the said Walter W. Motes and Jasper Robinson; that Taylor and the other three defendants on trial with him were held for trial by the commissioner and committed to jail without bail to await trial, and that since that time the said Taylor has been confined in the Jefferson county, Alabama, jail under commitment issued by said commissioner; that after the beginning of the present trial on the 20th of September, 1898, he went to the jail, took said Taylor into his custody
22 more than two days before said Taylor escaped, and that said Taylor had not been in jail since, but that he had placed him in charge of one Ed. May, a witness for the Government in this case, and instructed May to let Taylor stay at the hotel at night with his family, and that in pursuance of said instruction Taylor remained at the hotel Tuesday night and Wednesday night before he absconded on Thursday; that he saw Taylor in the corridors of the court-room about 10 o'clock a. m. Thursday, before he was called as a witness, about eleven o'clock the same day, and that when Taylor failed to respond he made a search for him in the city of Birming-

ham, and telegraphed to several places, and could not find him or learn anything at all as to his whereabouts.

Said witness, B. W. Bell, further testified that on the preliminary trial, before H. A. Wilson, United States commissioner, that Walter W. Motes and Jasper Robinson were arrested during the trial of the other defendants, Columbus W. Motes, John Littlejohn, and Dodge Blankenship, said Taylor having implicated them in his testimony upon said trial. The defendants were all represented upon said preliminary trial by Mr. Lee Cowart. Mr. Cowart cross-examined the witness, as shown in the testimony; that all of the defendants, including the said Walter W. Motes and Jasper Robinson, had an opportunity to cross-examine the said witness, Taylor, and he in fact was cross-examined by Mr. Cowart, acting either as attorney for Columbus W. Motes, John Littlejohn, and Dodge Blankenship or for all defendants; that said cross-examination was reduced to writing; *the* he (said Bell) had never made or offered the said Taylor any inducements, promises, reward, or hope to induce him to make said statement; that before said Taylor was examined as a witness on the said preliminary trial he was taken to the
23 office of the United States attorney, who cautioned him to make no statement unless it was purely voluntary, and told him emphatically that he could make no promise and offer him no hope whatever, and that said Taylor stated that he made the statement voluntarily and to relieve his own mind.

The U. S. attorney also offered the U. S. marshal as a witness, who testified that he had instructed his deputies that Taylor had escaped; that he had offered a reward of two hundred dollars for his ar-est; that he had made diligent search in the city of Birmingham for Taylor and could not learn anything as to his whereabouts.

The U. S. attorney also offered the chief of police of the city of Birmingham as a witness, who testified that he had not been officially notified that Taylor had escaped, but that he had seen something concerning it in the newspapers, and that he had made no special effort to arrest him and had no information as to his whereabouts.

The U. S. attorney then offered as a witness a deputy sheriff, who testified that the sheriff of Jefferson county and his deputies had been on the lookout for Taylor ever since his absence was known; that they had had photographs taken of him and sent them to various places, and that the deputies had been on the lookout for him all over Birmingham and other parts of Jefferson county, and that they had been unable to find him anywhere.

The Government then introduced as a witness H. A. Wilson, who testified as follows: I am a United States commissioner and held the preliminary trial in the case against these defendants on the 18th and 19th day- of August, 1898. The defendants Columbus W. Motes, William Robert Taylor, John Littlejohn, and Dodge Blankenship were brought before me upon a warrant issued on affi-
24 davit before U. S. Commissioner R. A. Moseley, Jr., by Special Officer Bell. Jasper Robinson and Walter W. Motes were

present in court while the case was being heard. William Robert Taylor, one of the defendants, during the trial proposed to make a statement in the nature of a confession. I cautioned him and told him that he could not be made to testify unless he choose to *to* do so, and asked him if any inducement or promise had been made or offered to him. He said there had not; that the statement was voluntary, and he made it to relieve his mind. Walter W. Motes and Jasper Robinson were present in court as defendants at the time, as well as the other defendants who were on trial. I swore William Robert Taylor as a witness, administering to him the usual oath. He was then examined and his testimony was committed to writing. I identify this statement (referring to the evidence of Taylor here handed to the witness) as the evidence taken before me. In his testimony, as is shown and as was the fact, he implicated the defendants Jasper Robinson and Walter W. Motes, who were arrested then and there. The defendants Columbus W. Motes, Blankenship, and Littlejohn were represented by Mr. Cowart, and so were the defendants Walter W. Motes and Jasper Robinson as soon as they were arrested, and the trial of the four defendants then on trial, to wit, Columbus W. Motes, William Robert Taylor, John Littlejohn, and Dodge Blankenship, was proceeded with and concluded in the presence of the defendants Jasper Robinson and Walter W. Motes.

Mr. Cowart, as a matter of fact, did cross-examine the witnesses, as is shown by this testimony and as I recollect it, and all of the defendants, including Walter W. Motes and Jasper Robinson, were allowed by me an opportunity to cross-examine, although no separate trial was had and all of these were examined without bail.

The Government then offered in evidence the testimony of WILLIAM ROBERT TAYLOR, which was in words and figures as follows:

25 WM. R. TAYLOR, being sworn, voluntarily makes the following statement as a witness in behalf of the United States in the cause now pending against John Littlejohn, Dodge Blankenship, Chess Motes, and Bob Taylor:

Q. Are you one of the defendants?
A. I am.
Q. Where do you live?
A. I live in Talladega county, near the line of Coosa, about 10 miles from Sylacauga.
Q. How old are you?
A. About thirty-three, I think.
Q. How long have you known Chess Motes?
A. I have known him nearly all his life.
Q. How long have you known Littlejohn and Blankenship?
A. I have known them nearly all my life.
Q. How long have you known Doc. Thompson before he was killed on March 14th, 1898?
A. I had known him for about 8 or 10 years before his death.

Q. Do you know where Doc. Thompson had been on the morning of the day he was killed?
A. He had been to Sylacauga.
Q. In what direction was he going the ev-ning he was killed?
A. Towards his home.
Q. About how far was he from his home when he was killed?
A. About a mile and three-quarters.
Q. Did you see him killed?
A. Yes, sir.
Q. Who killed him?
A. Chess Motes and Walter Motes.
Q. How many shots were fired?
A. Three.

26 Chess Motes fired the first shot out of a rifle, a squirrel rifle, and was a muzzle-loading rifle. Walter Motes fired the second and third shots with a pistol. The witness here is shown a rifle, which is offered in evidence, and, after examining it, identifies it as the gun used by Chess Motes in shooting W. A. Thompson, better known as Doc. Thompson. The gun belongs to Chess Motes. Chess Motes shot Doc. Thompson with this gun at the time he was killed, the ball striking him in the stomach. When the ball struck Thompson he walked a few steps and fell. After he fell Walter Motes shot him in the neck. Thompson got up after he fell. Walter Motes fired the shot that struck him in the neck after he got up. While Thompson was getting up he got some rocks, which he threw, hitting the defendant Blankenship, hitting him in the back.

After Thompson threw the rock he fell over the second time. Walter Motes then shot him in the head with a pistol, the ball striking him over one of his eyes. Thompson was lying on his back when Walter Motes fired the shot that hit him in the head. Walter was about a foot from him—that is, the pistol was about within a foot of his head. He was standing a little to the left and a little to the rear of him and placed the pistol within about a foot of his head and fired, the ball striking him in the forehead. Thompson never moved or said anything after he got this last shot. He was in the path when the first shot was fired by Chess Motes. When Walter Motes fired his first shot Thompson was four or five steps from the path. When Walter fired the last shot he was just a few steps from the path. At the time of the killing there were present myself, Chess Motes, Walter Motes, Dodger Blankenship, John Littlejohn, and Jasper Robinson. We were standing only a

27 few steps from the path when Chess Motes fired the first shot at Thompson; we were behind the trees. We were behind the trees waiting for Thompson to shoot him. We were behind the trees for about an hour before Thompson came up the path. We knew that he had gone to Sylacauga; Chess Motes said he had gone to Sylacauga, and we knew the path he would take in going back home. Chess Motes was standing behind a tree by the side of the path when he fired the shot that hit Thompson in the stomach. When the ball hit Thompson he walked on about four steps before

he fell. He left the path after he was hit. He did not make any remark after he was hit, that I know of. After he was first hit we all went towards him, Walter Motes getting to him first. The pistol Walter used in firing at Thompson was his own, I think. I had seen Walter with the pistol. When the ball hit Thompson in the head some blood or brains came out, the ball making a common-size hole. His face was powder-burnt from the pistol around the hole in his head. After he was killed his body was moved about 10 or 15 feet and put in the trail, I think, straight up and down. He was lying out straight in the trail. his hands being placed across his breast, his feet being straight out. He was lying on his back. Chess Motes crossed his hands over his breast. I do not remember who straightened out his feet. I don't think we all helped to move his body. I think myself, Chess Motes, and Walter Motes moved the body. When Thompson received the first shot his hat, bundles, etc., fell. I do not think he had on his coat, but had it on his arm. When the last shot was fired he did not have his hat or coat on. Blankenship and Littlejohn rode to the place where the killing occurred; one was on a horse and the other on a mule. Blankenship owned the mule. The mule and horse were hitched about fifty
28 or a hundred yards from the place where the killing occurred. I am tolerable good judge of distances. I saw the animals hitched there. I went to the place with Jasper Robinson—to the place of the killing—from my home. Chess Motes had told me that day that Thompson was going to pass that way. Chess and myself had talked about this matter before. Jasper Robinson and myself knew what we were going there for. Chess Motes said that he had notified the other parties. I went to Blankenship's house that day, having been sent there by Chess Motes, to tell Blankenship to go up there to the place where Thompson was afterwards killed. I did not find Blankenship at home. After the killing that night, I and Walter Motes went back to Blankenship's house. We killed Thompson because he had reported illicit distilleries in that neighborhood. We went to that place to kill him for that, and nothing else. The men he had reported was myself, Chess Motes, Walter Motes, Jasper Robinson, Ben Morris, and Dodger Blankenship. We all knew that he had reported us, or that he swore against us, and for this reason we went there to kill him, and he was killed. All these stills were said to be in that neighborhood.

Cross-examined by COUNSEL FOR DEFENDANTS:

I am one of the defendants arrested in this case, and have been in jail about 14 days, I think. I have not had any conversation with the Government officers about what I would testify in this case since I have been in jail. I did not tell them what I would testify while I was in jail. I have not at any time told any of the Government officers what I would swear to. I took it upon myself to testify, and I did not know that I was going to do it until I came in the court-house this morning. I had not been

asked by anybody to testify, and had not told any per-
29 son who killed Thompson except Mr. Bell. I told Mr. Bell how I killed Thompson this morning since breakfast. I did not see Mr. Bell until I was brought out of jail. I saw Mr. Bell in the jail office. When I told him that I saw Thompson killed I was here in the court-house and told him all that I knew about it. I knew Mr. Bell was a Government officer. He did not ask me to tell. I sent for Mr. Bell last night to come to the jail. The killing occurred, as well as I can recollect, between 4 and 5 o'clock the 14th day of March, 1898, on Monday. I first saw Chess Motes on the morning of the 14th of March. He came by my house. I did not work at a blacksmith's shop that day. I never worked in any blacksmith's shop on that day. It was early in the morning when Motes came by my house, which is about five miles from where Thompson was killed. Chess Motes was walking. I next saw Chess Motes at the path where Mr. Thompson was killed. That night, after the killing, I went to Blankenship's house. Walter Motes went with me. We found Mr. and Mrs. Blankenship at their house. There was no one else there. We stayed there till 8 o'clock that night. I saw John Littlejohn that evening at the place of the killing; had not seen him before that day and had not talked with him about the killing. John Littlejohn was there at the killing, but did not shoot any. We all went there to kill Thompson. John Littlejohn went there for that purpose also, but had nothing to do with it except stand there and see it done. John did not have any gun that I saw. He did not say anything to me about killing and had nothing to do with it. He came with Blankenship. Blankenship got hit, but did not hit anybody. I never told Blankenship and John Littlejohn what we were there for. I do not know whether Chess Motes went by for them or not. I do not know whether anybody told them to come there or not. I only know that Chess told me that he had told them. I never heard them say anything about killing Thompson. *I never heard them say anything about*
30 *killing Thompson.* I never heard Chess say anything about the killing in the presence of either of them. I never heard Blanken- or Littlejohn make any threats. I did not have any understanding with Littlejohn and Blankenship to meet me there that morning. It had been probably a week since I had seen them. Thompson had not been a witness against Littlejohn that I know of. I was not there when Blankenship was tried. Littlejohn and Blankenship had been there with us about an hour before Thompson was killed. So far as I know, they did not know that we were there, for Motes told me that he was going to Littlejohn's when he passed my house, which is about three and a half miles from my house. There was no one present when he passed my house, except my wife.

By the COURT:

Thompson did not say anything after he was first shot; he only threw the rock; all walked to the place except Blankenship and Littlejohn. We had been there for about an hour before Doc.

Thompson came along, scattered along the trail on each side behind trees. There was not a word said to Thompson before he was shot. After the last shot was fired we did not remain there more than five minutes. While we were moving the body the rest of them came along and stood by us. Chess Motes examined his (Thompson's) clothing after he was killed and found some money. Since Chess had been threatening to kill Thompson, we had an agreement that he was to be killed. Blankenship and Littlejohn were behind trees also.

31 Redirect:

It was probably nine o'clock when I made my statement to Capt. Bell. I told Capt. Bell that I wanted to talk with the district attorney. I had talked with Capt. Bell before I talked with the district attorney. I talked with the district attorney after I came into the court-house. This talk with Capt. Bell was in the court-house after I had been brought up for trial. I was in the office of the district attorney's office when I talked with *with* the district attorney, Capt. Bell, and Mr. Davidson, the assistant district attorney.

The district attorney notified me that he would make no promises as to what he would do, either directly or indirectly, and that I need not testify unless I wished to. I told the district attorney that I wanted to testify to relieve my mind of the trouble, and to give all the facts in connection with this case. He also told me that if I made a statement he wanted me to tell the truth, the whole truth, and nothing but the truth about any one.

From the ball of the foot down to the end of his toes the sole of his shoe was worn off exposing that portion of his foot or toes. I don't think Chess Motes had any other shoes at that time. The sole of the shoe was wore so that the upper part of the shoe made an impression as it dropped down—that is, the sides.

Cross-examination by COUNSEL FOR DEFENDANTS:

I stated this morning that I did not have any conversation with any Government officer while I was in jail. I saw Ben Morris on the day of the 14th, the day that Doc. Thompson was killed. He passed my house. I did not work for Ben Morris that day. I went to Mr. Blankenship's. Mr. Chess Motes stayed the night after the killing at my house. He was there when I came from Blankenship's.

his
W. R. x TAYLOR.
mark.

Witness:
C. F. MANLY.

32 The defendants then and there objected to the introduction of this testimony on the grounds that a sufficient predicate had not been made for its introduction. The court overruled the objection, and the defendants then and there duly objected and now

assigns the same as error. The defendants then and there objected to the reading of this testimony to the jury on the same grounds as above stated. The court overruled the objections, and the defendants then and there duly excepted.

The defendants Walter W. Motes and Jasper Robinson separately and severally then and there objected to the reading of said testimony to the jury on this trial as against them on the ground that they were not on preliminary trial at the time said testimony was taken, were not parties to the case then being tried, and had not been legally called upon to cross-examine said witness. The court overruled the objection, and the defendants Walter W. Motes and Jasper Robinson then and there duly excepted, and now assigns the same as error.

As corroborative of the testimony of said accomplice Taylor, the U. S. attorney offered one BEN MORRIS as a witness, who testified that about February or early in March he had a conversation with one of the defendants, Columbus W. Motes, in which said Motes told witness that he, Motes, had previously gone to the house of W. A. Thompson to kill him, but did not get to do it, and also said he was going to kill Thompson.

The U. S. attorney also offered as a witness Mrs. MARY TAYLOR, wife of the accomplice William Robert Taylor, who was then awaiting sentence under a plea of guilty to the indictment on which the defendants were then being tried. The defendants then and there duly objected to the evidence of this witness on the ground that she was the wife of one of the defendants mentioned in the indictment. The court overruled this objection, and the defendants then and there duly excepted, and now assign the same as error.

33 The said witness testified that she was the wife of the said William Robert Taylor; that on March 13th, 1898, one of the defendants, Columbus W. Motes, came to the house of witness and had a conversation in her presence with her husband, in which conversation she heard them agree that they would kill Thompson the next day as he came from Sylacauga; that in said conversation she heard them agree that they had got their cases continued, and that they would have to get rid of Thompson before next court to keep him from appearing as a witness against them in the U. S. court at Birmingham.

The U. S. attorney also offered as a witness Dr. J. E. PEARSON, who testified that he was a practicing physician and surgeon, a graduate of medicine and surgery, and had experience in examining blood of animals and human beings; that he had made a careful examination of the shoe shown him, which was shown to have been worn by one of the defendants, Columbus W. Motes, about the time Thompson was killed and previous thereto and afterwards found near said defendant's house, and that he had found on it particles of human blood and brains. The district attorney then asked the court to allow the jury to look through the microscope and

see for themselves the particles of blood and brains described by the witness, Dr. Pearson, and the defendants then and there objected allowing the jury to look through the microscope and examine said alleged blood and brains on the ground that it allowed the jury themselves to become experts. The court overruled the objection, and the defendants then and there duly excepted and now assigns the same as error.

The jury were then allowed one at a time to examine the alleged blood and brains through the microscope, and all of the jurors except two or three availed themselves of the privilege and did look through the microscope at the substance Dr. Pearson testified
34 had been taken from the show in question and was, in his opinion, human blood and brains. The defendants excepted to the action of the court in allowing the jury to look through the microscope, as above stated, and now assign such ruling of the court as error.

When the defendants respectively took the stand to testify in their own behalf and each in his own behalf, he was required by the ruling of the court to answer questions propounded by the U. S. attorney, and say whether or not he had been guilty of illicit distilling previous to the time said Thompson was killed. Before the defendants respectively answered these questions in behalf of each defendant who took the stand, counsel for the defendants objected to such questions on the ground that the answer was not relevant to the issue on trial; and, second, that it would tend to incriminate the defendant for an offense for which he was not now being tried. The court overruled the objection, and the defendants then and there separately and severally excepted to the ruling of the court and now assign the same as error.

The proof also showed that W. A. Thompson was, at the March term, 1893, of the district court of the United States for the southern division of the northern district of Alabama, convicted on an indictment charging him with the offense of illicit distilling and sentenced to serve a term of eighteen month- in the Iowa penitentiary, at Anamosa, Iowa.

The U. S. attorney also offered several other witnesses on behalf of the Government, but the tendency of their testimony is not stated in this bill of exceptions for the reason that no objection was made and no exception reserved to the testimony of said witnesses.

The defendants examined as a witness COLUMBUS W. MOTES, one of the defendants, who testified as follows: My name is Columbus W. Motes; I am about thirty years old. I know the defendants who are on trial for the murder of W. A. Thompson; I
35 knew Thompson, and know when and where he was killed; I also know who killed him.

He was killed on March 14th last, near his home, by myself and William Robert Taylor. No other person had anything whatever to do with it. I went to Taylor's house on March 13th, 1898, just after he had returned from Birmingham, where he had been attending the United States court as defendant. We were both under

indictment in the United States court at Birmingham for illicit distilling. Taylor attended court and I did not. W. A. Thompson was a witness against both of us, but I did not know who reported us. Taylor told me on the 13th of March, the day he got home from the United States court at Birmingham, that he got our cases continued on March 12th, 1898, until the next term of the court. We then and there agreed to kill Thompson to keep him from appearing as a witness against us at the next term of the court. We agreed to kill him on the next day as he came from Sylacauga, so the neighbors would think he was killed by Dodge Blankenship and Ad Smith, who only a few days before that time had been arrested and bound over for illicit distilling.

We took my gun, a rifle, and went to the place where we knew Thompson would pass and waited until he came along. Taylor shot him three times with the rifle. I was watching, according to the agreement between us, to see if any person saw us. The third shot is the one that killed him. The bullet entered his forehead. After we killed him, which was about the middle of the evening, we got his money out of his pockets, eighteen dollars, all in two-dollar bills, and the next morning we hid it in a tree near Taylor's house.

36 Neither John Littlejohn, Dodge Blankenship, Walter Motes, or Jasper knew anything about our plans to kill Thompson, were not present when he was killed, and had nothing whatever to do with the murder.

37 After the testimony was closed and before the jury retired to deliberate upon their verdict, the defendants asked the court to give to the jury the following charges in writing, numbered for the purpose of this bill of exceptions consecutively from 1 to 14:

1.

If the jury believe the evidence, they will find the defendants not guilty.

2.

If the jury believe the evidence, they will find the defendant Walter Motes not guilty.

3.

If the jury believe the evidence, they will find the defendant Jasper Robinson not guilty.

4.

A probability of the innocence of the defendants Dodge Blankenship, John Littlejohn, Walter Motes, and Jasper Robinson is a just foundation for a reasonable doubt of their guilt, and is therefore sufficient to entitle them to a verdict of not guilty.

5.

The court charges the jury that before a conspiracy can be established and made out they must be satisfied beyond a reasonable

doubt that there was an agreement by and between them to commit the offense charged in the indictment, and that though they may find that this agreement was made by some of the defendants, and yet if they were not present and either aided or abetted in the consummation of the offense, they must find the defendants not guilty.

38 6.

To be a citizen of the United States means that a person has been born or naturalized in the United States. Mere proof of the fact that a person has had his residence in the United States is not sufficient to make him a citizen of the United States within the meaning of the law.

7.

A person may reside in Talladega county, Alabama, or in any other place in the United States, and not be a citizen of the United States within the meaning of the law, and before the jury can convict the defendants in this case they must believe from the evidence in the case beyond a reasonable doubt and to a moral certainty that W. A. Thompson was not only a resident of Talladega county, Alabama, but that he was also a citizen of the United States, entitled to all of the civil and political rights to which a citizen may be entitled under the Constitution and laws of the United States.

8.

The court charges the jury that if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the Government, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed that if the more perfect exposition had been given, it would have laid open the deficiencies and objections which the more obscure and uncertain testimony was intended to conceal.

9.

That if the jury believe from the evidence that Robert Taylor and Columbus Motes were the only defendants that did conspire to kill Thompson in the account of exercising the right of a
39 citizen of the United States in becoming a witness in the court of the United States, then they will find Walter Motes, Jasper Robinson, John Littlejohn, and Mark Blankenship not guilty.

10.

That although the jury may believe from the evidence that W. A. Thompson came to his death at the hands of the defendants, this is not sufficient to convict the defendants as charged; that they must further find from the evidence that the defendants, each of them, did conspire in manner and form as charged in the indictment, and

if they fail to find that there was a conspiracy between the defendants as charged in the indictment, then they must find the defendants not guilty.

11.

The court charges the jury that the testimony of Robert Taylor, taken before the commissioner in the preliminary trial, cannot be considered by them as evidence against the defendants not on trial at the time at which the testimony was taken.

12.

If the jury finds from the evidence that W. A. Thompson had been convicted of an offense punishable by imprisonment in the penitentiary and sentenced to serve a term of eighteen month- in the penitentiary, they will find all of the defendants not guilty.

13.

If the jury find from the evidence that W. A. Thompson has been convicted of an offense punishable by imprisonment in the penitentiary, they will find all of the defendants not guilty.

14.

If the jury believe from the evidence that W. A. Thompson was killed because he was a witness in the district court of the United States, and they should find further that these defendants or either of them are guilty of the murder of Thompson, it is then the duty of the jury to find such defendant or defendants guilty as charged in the seventh or last count in the indictment.

Each and every one of the foregoing charges, from No. 1 to No. 14, inclusive, was separately refused by the court. The defendants then and there duly excepted separately to the ruling of the court in refusing each and every one of said above-numbered written charges, and now assigns such ruling of the court separately as to each of said charges as error.

The objections and exceptions as set forth in this bill of exceptions were made and reserved before the jury retired to deliberate upon their verdict. After the conviction of the defendants by the jury and before the sentence was pronounced by the court the defendants filed the following motion in arrest of judgement:

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

"THE UNITED STATES
vs.
WALTER W. MOTES ET ALS.

Now comes the defendants in above case, after the rendition of the verdict of the jury finding them guilty as charged in the indictment and before judgement and sentence, and moves the court

to arrest the judgement in this case upon the ground that said indictment charges the defendants in each count thereof with two separate and distinct offenses not of the same class.

2nd. That said indictment charges the defendants with two separate and distinct offenses, viz., said indictment charges the defendants with conspiracy, in violation of section 5508 of the Revised Statutes of the United States, which prescribes a punishment
41 of not more than ten years' imprisonment, and in the same count, in each and every count of said indictment, the defendants are charged with murder in the first degree, which offense is not of the same class as the other offense charged in the indictment.

LEE COWART,
Attorney for Defendants."

"Indorsed: 2348. The United States *vs.* Walter W. Motes *et als.* Motion in arrest of judgement. Filed October 4th, 1898. N. W. Trimble, clerk."

The court overruled said motion, and to said ruling of the court the defendants then and there duly excepted and now assign the same as error.

And in the several actions and rulings of the court hereinbefore set forth, to which objections were made and exceptions reserved, the defendants say there is manifest error and here and now tender this their bill of exceptions, which is duly signed, sealed, and had in term time this 6th day of December, 1898.

JOHN BRUCE, *Judge.*

Filed Decemb. 6th, 1898.
(S'g'd) N. W. TRIMBLE, *Clerk.*

42 Convening September Term of Court, March 5, 1898, September Term, 1898.

UNITED STATES OF AMERICA, }
Northern District of Alabama, Southern Division. }

Pleas had at a regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-room, in the city of Birmingham, in said division of said district, the first Monday of September, it being the 5th day thereof, in the year of our Lord 1898, and of the Independence of America — 123 year.

Present: Hon. John Bruce, judge of the district courts of the United States for the middle and northern districts of Alabama, sitting as circuit judge; Wm. Vaughan, Esq., U. S. attorney; J. W. Davidson, Esq., ass't U. S. attorney; D. N. Cooper, U. S. marshal, and N. W. Trimbel, clerk.

TUESDAY MORNING, *Sept.* 13*th*, 1898.

THE UNITED STATES
vs.
WALTER W. MOTES, COLUMBUS W. MOTES, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship.
} Indictment for Violation of Section 5508, R. S. U. S.

This day comes the United States, by its attorney, William Vaughan, Esq., and also come the defendants, Walter W. Motes, Columbus W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, in person, in open court, and by their counsel, Lee Cowart, Esq., and, being duly ar-
43 raigned and said indictment filed in said cause being read to them by the U. S. attorney, all and each of said defendants, except William Robert Taylor, plead not guilty, and to said indictment the said William Robert Taylor, one of the defendants, pleads guilty.

It is ordered that this cause be set down for trial on Tuesday, September 20th, A. D. 1898.

WEDNESDAY MORNING, *September* 14*th*, *A. D.* 1898.

THE UNITED STATES
vs.
COLUMBUS WINCHESTER MOTES ET ALS.
} Indictment for Violation of Section 5508, R. S. U. S.

On a former day of this term, the defendants, Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, having been duly arraigned in open court, each for himself, plead "not guilty," except William Robert Taylor, who pleaded "guilty." It is hereby ordered and adjudged that said cause be set down for trial on Tuesday next, September 20th, A. D. 1898, and it is further ordered that the clerk and marshal draw from the regular jury-box, in open court, the names of thirty-five persons to serve as jurors at this term of the court, and the clerk will issue a venire for such persons so drawn as jurors and place the same in the hands *hands* of the marshal, and the marshal shall execute the same by summoning said thirty-five persons to attend and serve as jurors. It is further ordered that the clerk shall make out certified copies of the indictment in this cause, together with correct lists of the names and residences of the thirty-five jurors this day drawn in open court, as aforesaid. If is further ordered that the marshal shall serve upon each of said defendants a copy of the indictment in said cause,
44 together with a copy of the lists, as aforesaid, of the said jurors, both these on the regular panel and these this day drawn in open court. It is further ordered that the clerk prepare a list of the Government witnesses in this cause and the marshal will serve each defendant with a copy of such list.

It is further ordered that the marshal shall serve copies of the

indictment, the list of jurors, and the list of said witnesses upon each of said defendants at least two entire days before the 20th day of September next, the day on which said cause is set down for trial.

The marshal and clerk, by order of court, bring into court the jury-box, and draw the names of the following persons as jurors :

R. C. Rector,	Vernon,	Lamar	county.
James C. Knight,	Hurley,	Cherokee	"
Mack Cummings,	Gadsden,	Etowah	"
J. F. McNeal,	Sloan,	Blount	"
Hope Hargrove,	Cottondale,	Tuscaloosa	"
Noah McGhee,	Centre,	Cherokee	"
Geo. P. Jones,	Aldrich,	Shelby	"
John Trimble,	Bodka P. O.,	Sumter	"
William Allen,	Woodstock,	Bibb	"
Charles A. Vildibill,	Avondale,	Jefferson	"
Thomas Y. Daniels,	Taff,	Cherokee	"
S. A. Ryland,	Adville,	Blount	"
W. H. McElrath,	Spring Garden,	Cherokee	"
Henry P. Stewart (c.),	Piedmont,	Calhoun	"
William Leonald (c.),	Pleasant Ridge,	Greene	"
J. E. James,	Jamesville,	Bibb	"
John Inge (c.),	Ramsey,	Sumter	"
Zack Story (c.)	Mantan,	Greene	"
Marcus T. Martin,	Anniston,	Calhoun	"
Nick Carnes,	Oneonta,	Blount	"
James E. Ruffin,	Helena,	Shelby	"

45

Owen Nealy (c.),	Ashville,	St. Clair.
James Donovan,	Birmingham,	Jefferson.
John M. Satterfield,	"	"
Sidney W. Lee,	"	"
Charles W. Frobus,	"	"
W. H. Shepherd,	Berry Station,	Fayette.
W. R. Hall (c.),	Horse Creek,	Walker.
George Washington (c.),	Birmingham,	Jefferson.
Joseph C. Lindsay (c.),	Anniston,	Calhoun.
R. H. Hudson,	Coalburg,	Jefferson.
C. W. Ewing,	Gadsden,	Etowah.
John McGhee (c.),	Bangor,	Blount.
C. J. Geary,	Eutaw,	Greene.
Rhodes H Alston (c.),	Calera,	Shelby.

FRIDAY MORNING, *September 16th, A. D.* 1898.

UNITED STATES
vs.
WALTER W. MOTES ET ALS. } Indictment Vio. Sec. 5508, R. S. U. S.

This cause coming on to be heard on motion of defendants' counsel for witnesses under sec. 878, R. S. U. S., and the same being

argued by counsel and duly considered by the court, it is ordered that the application prayed for be granted.

46 TUESDAY MORNING, *September 20th, A. D.* 1898.

UNITED STATES *vs.* WALTER W. MOTES, COLUMBUS W. MOTES, Wm. Robert Taylor, Jasper Robinson, John Littlejohn, Mark Grant Blankenship.	2348.	Sec. 5509, R. S.

This day comes the marshal of this district and returns that, in obedience to the special venire heretofore issued out of and under the seal of this court in this cause, and to him directed *returns*, he has summoned from the body of this district, according to law, as special petit jurors, the following-named persons, to wit:

R. C. Rector,	Vernon,	Lamar	Co., Ala.
Jas. C. Knight,	Hurley,	Cherokee	" "
Mack Cummings,	Gadsden,	Etowah	" "
J. F. McNeal,	Sloan,	Blount	" "
Hope Hargrove,	Cotton Dale,	Tuscaloosa	" "
Noah McGhee,	Centre,	Cherokee	Co., "
George P. Jones (c.),	Aldrich,	Shelby	" "
John Trimble,	Bodka P. O.,	Sumter	" "
William Allen,	Woodstock,	Bibb	" "
Chas. A. Vildibill,	Avondale,	Jefferson	" "
Thos. Y. Daniels,	Taff,	Cherokee	" "
S. A. Ryland,	Adville,	Blount	" "
W. H. McElrath,	Spring Garden,	Cherokee	" "
Henry P. Stewart (c.),	Piedmont,	Calhoun	" "
Wm. Leonard (c.),	Pleasant Ridge,	Greene	" "
J. E. James,	Jamesville,	Bibb	" "
John Inge (c.),	Ramsey,	Sumter	" "
47 Zack Storey (c.),	Mantau,	Greene	Co., "
Marcus T. Martin,	Anniston,	Calhoun	" "
Nick Carnes,	Oneonta,	Blount	" "
J. E. Ruffin,	Helena,	Shelby	Co., "
Owen Neely (c.),	Ashville,	St. Clair	Co., "
James Donovan,	Birmingham,	Jefferson	" "
Jno. M. Satterfield,	"	"	" "
Sidney W. Lee,	"	"	" "
Charles W. Frobus,	"	"	" "
W. H. Shepherd,	Berry Station,	Fayette	" "
W. R. Hall (c.),	Horse Creek,	Walker	" "
Geo. Washington (c.),	Birmingham,	Jefferson	" "
Joseph C. Lindsay (c.),	Anniston,	Calhoun	" "
R. H. Hudson,	Coalburg,	Jefferson	" "
E. W. Ewing,	Gadsden,	Etowah	" "
Jno. McGhee (c.),	Bangor,	Blount	" "
C. J. Geary,	Eutaw,	Greene	" "
Rhodes H. Alston,	Calera,	Shelby	" "

all of whom are now present except the following-named persons, to wit: Hope Hargrove, George P. Jones (c.), W. H. McElrath, and C. J. Geary.

For good and sufficient cause shown to the court, it is ordered that the following-named persons, summoned as petit jurors on the special venire, to wit, Jas. C Knight, J. T. McNeal, Chas. A. Vildibill, S. A. Ryland, J. E. Ruffin, Chas. W. Frobus, R. H. Hudson, and C. W. Ewing, are hereby excused.

UNITED STATES
vs.
WALTER W. MOTES ET ALS. } 2348. Sec. 5509 & 5508, R. S.

The manner of drawing and selecting the petit jury to try this cause having been drawn to the attention of the court, it is ordered by the court that the drawing and selection of said jury
48 shall be from those petit jurors now present belonging to and whose names are upon the list of regular jurors and also upon the list of special jurors now present in court, and the clerk is hereby directed to write upon slips of paper the names of the special jurors summoned for the trial of this cause as well as the names of the regular jurors now in attendance upon court, and fold or roll up and place said slips of paper containing such names as aforesaid and place the same in a box *as* some substitute therefor and have the same in court, and that the same be well shaken together, and it is further ordered that D. N. Cooper, Esq., U. S. marshal, be, and he is hereby, designated by the court to draw, in its presence, out such slips, one by one, until the jury is completed.

No. 2348. In obedience to the order of court of this date, the clerk did, in the manner as directed in said order, prepare the slips of the regular and special jurors present, fold up and place the same in a box, and shook same up in open court, the following being the names on the slips thus deposited in said box, to wit:

Benj. F. Wilson,	Round Mountain P. O.,	Cherokee	Co., Ala.
Dempsey Winn,	Livingston,	Sumter	" "
George Flemming,	Lawrence Sta.,	Cherokee	" "
Samuel Snoddy,	Jasper,	Walker	" "
William H. Bryan,	Birmingham,	Jefferson	" "
Marshal R. Murphy,	Oneonta,	Blount	" "
James Moore,	Tuscaloosa,	Tuscaloosa	" "
John McCoy,	Birmingham,	Jefferson	" "
R. C. Rector,	Vernon,	Lamar	" "
Mack Cumming (c.),	Gadsden,	Etowah	" "
Noah McGhee,	Centre,	Cherokee	" "
John Trimble,	Bodka P. O.,	Sumter	" "
Wm. Allen,	Woodstock,	Bibb	" "
Thomas Y. Daniels,	Taff,	Cherokee	" "
Henry P. Stewart (c.),	Piedmont,	Calhoun	" "
Elijah Smith,	Hamner,	Sumter	" "
James D. Hilton,	Carbon Hill,	Walker	Co., "

	Benj. F. Ginnings,	Rockrun,	Cherokee	"	"
49	T. B. Garren,	Tidmore,	Blount	Co.,	"
	Sam. Gilmore,	Columbiana,	Shelby	"	"
	Geo. W. Phillips,	Wynville,	Blount	"	"
	Frank M. Jeffries,	Fayette,	Fayette	"	"
	John P. Clements,	Northport,	Tuscaloosa	Co.,	"
	Monroe McAnally,	Blount Springs,	Blount	"	"
	Columbus C. Files,	Hugent,	Fayette	"	"
	Porter G. Pendergrass,	Fort Payne,	De Kalb	Co.,	"
	Richard Kemp,	Birmingham,	Jefferson	"	"
	Joe Lawrence,	Gadsden,	Etowah	"	"
	James H. Morrow,	Trussville,	Jefferson	"	"
	W. Spencer Jack,	Stewart's Sta.,	Hale	"	"
	W. R. Lollar, Sr.,	Oregonia,	Tuscaloosa	"	"
	George D. Fowler,	Liberty,	Blount	"	"
	Wm. H. Hunter,	Birmingham,	Jefferson	"	"
	Jackson A. Burgess,	Weavers,	Calhoun	Co.,	"
	Frank H. Hamilton,	Bham,	Jefferson	"	"
	Wm. Leonard (c.),	Pleasant Ridge,	Greene	"	"
	J. E. James,	Jamesville,	Bibb	"	"
	John Inge (c.),	Ramsey,	Sumter	"	"
	Zack Storey (c.),	Mantau,	Greene	"	"
	Marcus T. Martin,	Anniston,	Calhoun	"	"
	Owen Nealy (c.),	Ashville,	St. Clair	"	"
	Jas. Donovan,	Bham,	Jefferson	"	"
	John M. Satterfield,	"	"	"	"
	Sidney W. Lee,	"	"	"	"
	W. H. Shepperd,	Berry Sta.,			
	W. R. Hall (c.),	Horse Creek,	Walker	"	"
	Geo. Washington (c.),	Bham,	Jefferson	"	"
	Joseph C. Lindsay (c.),	Anniston,	Calhoun	"	"
	John McGee (c.),	Bangor,	Blount	"	"
	Nick Carnes,	Oneonta,	"	"	"

50 And, in further obedience to said order, the marshal did, in open court, draw out from the box containing the names hereinbefore stated, one by one, such slips until the jury to try this case was completed, the following being the names of the jury (as completed) to try said cause, to wit:

1. George Washington.
2. T. B. Garren.
3. Jno. M. Satterfield.
4. James Donovan.
5. Sam. Gilmore.
6. Porter G. Pendergrass.
7. Wm. Allen.
8. Mark Cumming.
9. Geo. D. Fowler.
10. Wm. H. Bryan.
11. Frank H. Hamilton.
12. Frank H. Jeffries.

THE UNITED STATES
vs.
W. W. MOTES ET AL. } 2348. Sec. 5509.

Ordered by the court that all other jurors whose names are in the special venire, excepting those who are on the panel selected to try this cause, are hereby excused for the term.

THE UNITED STATES
vs.
WALTER W. MOTES ET ALS., C. W. MOTES, Jasper Robinson, Jno. Littlejohn, M. G. Blankenship. } 2348. Sec. 5509 & 5508, R. S.

Come the parties, by their attorneys, and also come the defendants in their own proper persons, who, being duly arraigned
51 upon the indictment filed herein against them and *who* after hearing said indictment read over to them, each for himself pleads not guilty.

Thereupon, to try the issues joined, come a jury of good and lawfule men, to wit, James Donivan and eleven others, who were duly elected, tried, and sworn, — the hearing of this cause is now commenced.

During the examination of witnesses, the usual hour of daily adjournment having arrived, the *forthe* trial of this cause is continued until tomorrow morning at 10 o'clock.

WEDNESDAY MORNING, *September* 21*st*, 1898.

THE UNITED STATES
vs.
WALTER W. MOTES ET AL. } 2348. Vio. Sec. 5508 & 5509, R. S.

Come again the parties, by their attorneys, and also come the defendants, Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, in custody of the marshal, in their own proper persons, and also comes the same jury heretofore empanneled and sworn to try the issues joined herein, and the further trial of the cause is now *returned*, and during the examination of witnesses the hour having arrived for taking of the usual midday recess, and the trial of the cause not being concluded, it is ordered by the court that the jury trying said cause be placed in custody of a bailiff, and that they be kept together during said recess, and that they be again brought into court by said bailiff at 3 o'clock p. m., at which hour the further trial of this cause will be resumed.

UNITED STATES
vs.
WALTER W. MOTES ET AL. } 2348. Sec. 5509.

Ordered by the court that the marshal do furnish to the jury trying this cause, and also to the bailiff having charge of them,

their dinner, and that the expense therefor be borne by the
52 United States and paid for by said marshal out of any funds that may be now or that may hereafter come into his hands available for such purpose.

THURSDAY MORNING, *Sept. 29th*, 1898.

Court met pursuant to adjournment.

Present: The Hon. John Bruce, judge of the district courts of the United States for the middle and northern districts of Alabama, presiding and sitting as circuit judge; Hon. William Vaughan, U. S. attorney; Messrs. Shelby S. Pleasants and J. W. Davidson, assistant U. S. attorneys; D. N. Cooper, Esq., U. S. marshal, and N. W. Trimble, clerk.

THE UNITED STATES *vs.* WALTER W. MOTES, COLUMBUS MOTES, Jasper Robinson, John Littlejohn, Mark Grant Blankenship.	2348. Vio. Ses. 5508 & 5509, R. S.

Come again the parties, by their attorneys, and also come each and all of the above-named defendants, in their own proper persons, in custody of the marshal, and also come the same jury heretofore empanelled and sworn to try the issues joined herein, and the said jury, after having heard all the evidence addressed and after the conclusion of the arguments of counsel and after being charged by the court, retired to their room to deliberate upon the cause and consider of their verdict.

53 THURSDAY, *Sept. 29th*, 1898.

UNITED STATES *vs.* WALTER W. MOTES, COLUMBUS W. MOTES, Jasper Robinson, John Littlejohn, Mark Grant Blankenship.	2348. Sec. 5508 & 5509, R. S. U. S.

Come again the parties, by their attorneys, and the defendants being present in open court, the jury, after being in retirement for some time, come into open court — returns their verdict, whicl. reads as follows, to wit: "We, *rge* jury, find the defendants, Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, guilty as charged in the indictment, Sepy. 29, 1898. We, the jury, ask the mercy of the court for the four defendants, Walter W. Motes, Jasper Robinson, John Littlejohn, Mark Grant Blankenship, and especially for John Littlejohn and Jasper Robinson.

JOHN M. SATTERFIELD, *Foreman.*"

TUESDAY MORNING, *Oct. 4th*, 1898.

UNITED STATES *vs.* WALTER W. MOTES, COLUMBUS W. MOTES, JASPER Robinson, John Littlejohn, & Mark Grant Blankenship.	Sec. 5509, R. S.

The defendants above named and each and all of them having heretofore been convicted by the verdict of the jury who
54 tried their cause on a former day of this term, and they being now present in open court, and each of them in turn, after being asked by the court if he had anything to say why the sentence of the court in accordance with law should not be pronounced upon him, says nothing, it is therefore, *om* obedience to the verdict of said jury and in conformity to law, ordered by the court that the said defendants, Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, shall suffer imprisonment in the penitentiary at Raleigh, in the State of North Carolina, for life—that is, that each of said defendants, to wit, Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, shall be imprisoned in said penitentiary at Raleigh, in the State of North Carolina, for the period of his natural life.

It is further ordered that said defendants pay the costs of this prosecution, for which execution may issue.

WEDNESDAY MORNING, *Oct.* 26, 1898.

UNITED STATES *vs.* WALTER W. MOTES, COLUMBUS W. MOTES, JASPER ROBINSON, John Littlejohn, Mark Grant Blankenship.	2348.

This cause coming on to be heard upon the petition of the above-named defendants for a writ of error, and after due consideration by the court, it is ordered that the prayer of said petition be, and the same is hereby, allowed, and the said writ of error is hereby directed to be issued in accordance with the prayer of said petition.

55 TUESDAY MORNING, *November 15th, A. D.* 1898.

UNITED STATES *vs.* WALTER W. MOTES, COLUMBUS W. MOTES, JASPER ROBINSON, John Littlejohn, & Mark Grant Blankenship.	2348.

This cause coming on to be heard upon the motion of the above-named defendants to postpone the execution of the sentence and judgment of the court heretofore imposed upon them, pending the appeal in this cause, and after argument of counsel and due consideration by the court, it is ordered that said motion be, and the same is hereby, refused and denied without prejudice to the rights of said defendants to renew said motion any time during the day.

UNITED STATES
vs.
WALTER W. MOTES ET ALS.

It appearing to the court that heretofore, on a former day of this term, the above-named defendants filed their petition praying, among other things, for a writ of error returnable to the Supreme Court of the United States, and it further appearing that the prayer of said petition has been allowed, whereupon, on the renewal of the motion of said defendants, it is now ordered by the court that the execution of the sentence heretofore imposed upon said defendants be, and the same is hereby, stayed and postponed pending said writ of error.

56 NOVEMBER 26TH, 1898.

UNITED STATES
vs.
WALTER W. MOTES, COLUMBUS W. MOTES, Jasper Robinson, John Littlejohn, & Mark Grant Blankenship. } Vio. Ses. 5508 & 5509, R. S. U. S.

Upon motion of the above-named defendants, it is ordered by the court that 10 days' further time be, and the same are hereby, allowed said defendants to present and file their bill of exceptions in this cause, and the same to be treated as filed in term time.

57 MARCH 2, 1899.

Court met pursuant to adjournment.

Present: Hon. Harry T. Toulmin, judge of the district court of the United States for the southern district of Alabama, sitting and presiding under the orders of designation and appointment by the Hon. Don A. Pardee, circuit judge; Wm. Vaughan, U. S. attorney; J. W. Davidson, ass't U. S. attorney; D. N. Cooper, U. S. marshal, Esq., by his chief office deputy, James Bruce, and N. W. Trimble, clerk.

UNITED STATES
vs.
C. W. MOTES ET ALS. } No. 2348.

Ordered by the court that the motion of defendants for a new trial of this cause be, and the same is hereby, continued until the next term of the court.

(S'g'd) HARRY T. TOULMIN, *Judge.*

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the northern district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, *or* between the United States of America and Colum-

bus Winchester Motes, alias Chess Motes; Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, a manifest error hath happened, to the great damage of the said Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias *D* Dodge Blankenship, alias Dodger Blankenship, as by their complaint appears, *apperas*, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within 30 days from the date hereof, in the said Supreme Court of the United States, to be then and there held, *and*, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 18th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.]

N. W. TRIMBLE,
Clerk of the Circuit Court of the United States for the Northern District of Alabama.

Allowed by—
JOHN BRUCE,
Judge Presiding.

Marshal's Return.

UNITED STATES OF AMERICA, *Nor. Dist. Ala., Sou. Div.*, } ss:

Personally appeared D. N. Cooper, U. S. marshal for said district, who, being duly sworn, deposes and says that he served a copy of the within writ of error on Wm. Vaughan, U. S. attorney for said district, on February 22, 1899, and mailed a copy of the same to the Attorney General, Washington, D. C., on February 22, 1899.

D. N. COOPER,
U. S. Marshal.

Subscribed and sworn to before me this 3rd of March, A. D. 1899.

N. W. TRIMBLE,
Clerk U. S. Circuit Court, Nor. District of Alabama.

Returned and filed March 3, 1899.

N. W. TRIMBLE, *Clerk.*

59 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 20th day of March, A. D. 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern division of the northern district of Alabama, wherein Columbus Winchester Motes, alias Chess Motes; Walter W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, are plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

[SEAL.] Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18 day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN BRUCE, *Judge.*

Marshal's Return.

UNITED STATES OF AMERICA, } ss:
Nor. Dist. of Alabama, Sou. Div., }

Personally appeared D. N. Cooper, U. S. marshal for said district, who, being duly sworn, deposes and says that he executed the within citation by serving a copy thereof on Wm. Vaughan, U. S. attorney for said district, on February 22, 1899, and by mailing a copy of the same to the Attorney General, at Washington, D. C., on Feb. 22, 1899.

D. N. COOPER,
U. S. Marshal.

Subscribed and sworn to before me this 3rd day of March, 1899.

N. W. TRIMBLE,
Clerk U. S. Circuit Court, Nor. Dist. Alabama.

Returned and filed this March 3, 1899.

N. W. TRIMBLE, *Clerk.*

60 UNITED STATES OF AMERICA, }
Northern District of Alabama, Southern Division. }

I, N. W. Trimble, clerk of the circuit court of the United States of America in and for said division of said district, do hereby certify that the foregoing is a true, full, and complete transcript of the

record and proceedings in the case lately pending in said court between The United States *vs.* Columbus Winchester Motes, alias Chess Motes, and others, as fully as the same does appear of record in my office.

Seal U. S. Circu Court, Nor. Dist. Ala.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Birmingham, in said district, this 18th day of March, 1899.

N. W. TRIMBLE,
Clerk of the U. S. Circuit Court, Nor. Dist. Ala., Sou. Div.

[Endorsed:] United States *vs.* Walter W. Motes, Chess Motes, and others. Transcript from U. S. cir. court.

Endorsed on cover: File No., 17,359. N. Alabama C. C. U. S. Term No., 257. Columbus Winchester Motes, alias Chess Motes, *et al.*, plaintiffs in error, *vs.* The United States. Filed April 10th, 1899.

In the Supreme Court of the United States.

Columbus Winchester Motes, alias Chess Motes, et al.
Plaintiff in Error.

VS.

The United States,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Statement of the Case.

The Plainiffs in error, Columbus Winchester Motes, alias Chess Motes, Walter W. Motes, John Littlejohn, Mark Grant Blankenship, alias Dodge Blankenship, Jasper Robinson and William Robert Taylor (who is not a plaintiff in error), were indicted at the September term, 1897, of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, at Birmingham, Alabama, under Sections 5508 and 5509 of the Revised Statutes of the United States, which read as follows viz.:

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of

another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter inelligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States.

Sec. 5509. If in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor, by the laws of the State in which the offense is committed."

Their trial was begun at Birmingham, Alabama, on the 20th day of September,1898.

W. A. Thompson, alias Dock Thompson, was found dead on the highway, about a mile and a half from his home on the 16th day of March, 1898, and his death was produced from gunshot wounds. The place where his body was found was distant from the homes of the plaintiffs in error respectively as follows, viz.: about three miles east of where Columbus W. Motes, Walter W. Motes and Jasper Robinson resided, and about three miles north of where John Littlejohn resided, and eight miles north of where the other plaintiff in error—Blankenship—resided; and the evidence was, that deceased had been dead about forty-eight hours when his body was discovered. The deceased had reported and informed R. A. Moseley, Jr., a United States Commissioner for said Division and District, that the plaintiffs in error, excepting John Littlejohn, had been guilty of illicit distilling in violaton of the revenue laws of the United States, and upon such charge each of the plaintiffs in error, except John Littlejohn, had been arrested, bound over and indicted in the United States Court at Birmingham, Ala., and the said cases were pending in the United States Court at Birmingham at the time deceased came to his death, and deceased was on record as a witness to be called against the defendants (plaintiffs here in error). The deceased had also reported and informed upon others in his neighborhood.

The theory of the prosecution was that the plaintiffs in error had killed the deceased because he exercised a right of a citizen of the United States in informing upon and causing the arrest of the plaintiffs in error.

The plaintiffs in error (defendants below) had been arrested and brought before H. A. Wilson, a Commissioner of the United States, for a preliminary examination, on the present charge. The defendants, Columbus W. Motes, William Robert Taylor, John Littlejohn, and M. G. alias Dodge Blankenship, were put upon a preliminary trial before said United States Commissioner, H. A. Wilson, in the month of August, 1898, and were represented by counsel, viz., Lee Cowart, Esq., of Birmingham, Ala.

During the progress of the trial of the last named four defendants, one of said defendants, viz., William Robert Taylor, made a confession in open court, which was reduced to writing by the Commissioner, and in this deposition this defendant implicated the remaining three defendants, Columbus W. Motes, John Littlejohn and M. G. alias Dodge Blankenship. He went further, and implicated Walter W. Motes and Jasper Robinson, who were arrested soon afterwards, and on the same day, and brought before the same Commissioner, H. A. Wilson, while the trial of the other four was in progress.

It does not appear at what hour nor how far the trial had progressed, when Walter W. Motes and Jasper Robinson were brought into Court. It does not appear that the two last named, Motes and Robinson, were put upon trial, or if the Commissioner so intended that they were even notified of the fact, nor that they had counsel to assist them on said preliminary trial, nor that they cross-examined the defendant, William Robert Taylor, nor that they were present in court when he testified or heard all of his testimony implicating them in the murder of W. A. Thompson, nor does it appear that they had a reasonable time to procure counsel, or were asked if they were ready for trial. (See Record, page 17 to 22.)

It does appear from the testimony of B .W. Bell, "who worked these cases up," that the defendants, Walter W. Motes and Jasper Robinson, were not arrested until the trial of the other four defendants had been in progress before Commissioner Wilson for two days. (See Record, page 17.) It further appears, from the testimony of the Commissioner, H. A. Wilson, given on the final trial, that no separate trial of these last (two) named defendants was had, and "all of these were committed

to jail without bail." (See Record, page 18 and 19.)

The defendant, William Robert Taylor, was taken from the Jefferson county jail two days before the final trial of his co-defendants, by the said B. W. Bell, who "worked these cases up," and turned over to one Ed. May, whose official station is not known, and who was instructed to allow prisoner to sleep at the hotel with his family. (See Record, page 17.) And the prisoner had the freedom of the courthouse and corridors (Record, page 17), and failed to answer when called as a witness, and in his stead his former deposition given upon the preliminary trial of some of these defendants in August preceding, was allowed to be read to the jury against objection of all the defendants, because it was not shown that the absent defendant-witness Taylor was either dead, ill, insane or beyond the jurisdiction of the Court. The defendants, Walter W. Motes and Jasper Robinson, objected severally to the reading of said deposition in evidence upon the further and additional ground that it was not competent testimony as against them, they never having been put upon trial, or notice, in the preliminary trial, nor cross-examined the witness, Taylor, nor allowed a reasonable time to do so, nor to procure counsel, nor the privilege of being present and hearing the witness testify, and seeing his countenance and manner while testifying, nor having the privilege of being confronted with the witness upon any trial.

The Court allowed this deposition to be read as evidence against all of the defendants. The Government introduced evidence tending to prove against the defendants the commission of other and distinct crimes (not illustrating the crime charged) at other times and places, viz.: Running and having illicit distilleries several years prior to any of these prosecutions, and in Talladega county, Alabama, which was objected to by defendants.

A threat made by Columbus Motes a few days prior to the killing of Thompson that he would kill Thompson, was testified to by the wife of William Robert Taylor, the defendant who had made the confessorial deposition (who was not on trial) and against his co-defendants, and objected to by them.

The Government then introduced Dr. J. E. Pearson as an expert surgeon and physician, and some animal substance scraped from a shoe,

alleged to have been worn by the defendant, Columbus W. Motes, and the expert pronounced this substance human blood.

Thompson was killed in March, 1898, and this trial was had on September 20, 1898, six months thereafter. The jury were permitted to examine it through microscope, which was objected to by defendants.

The defendants each testified for themselves, and each denied his guilt, except Columbus W. Motes, who confessed his own guilt, implicated William Robert Taylor as his companion in the crime, and wholly exculpated and exhonorated each of the others, his co-defendants.

While each of the defendants were upon the stand in his own behalf, the Court allowed the District Attorney to ask each defendant, and required the defendants to answer, whether or not he had been guilty of illicit distilling previous to the time said Thompson was killed, and the defendants objected to this because it tended to prejudice the jury against them by showing the commission of another offense, and did not tend to throw any light upon the question of their guilt vel non, which objection was overruled. The court refused fourteen (14) written charges asked on behalf of the defendants, which is assigned as error.

The trial resulted in a verdict of guilty as to each defendant. The defendants moved in arrest of judgment, which motion was overruled, and they were each sentenced to life imprisonment, and sentence suspended pending the prosecution of this writ of error.

Assignment of Error.

Plaintiffs have assigned the following errors upon which they will rely:

1. That the United States Circuit Court for the Southern Division or theNorthern District of Alabama erred in overruling the request of the plaintiffs to have the right to challenge eleven jurors each peremptorily on their trial in the said Circuit Court of the United States.

2. That the said Court erred in allowing the United States to challenge five jurors peremptorily.

3. The Court erred in allowing the Government to introduce evidence that the Deputy United States Marshals destroyed a distillery near the residence of the plaintiff in error, Blankenship.

4. The Court erred in allowing the Government to prove by Mrs. W. A. Thompson, against the objection of counsel for plaintiffs in error, that the said defendants, Walter W. Motes, Columbus W. Motes, William Robert Taylor, and Jasper Robinson, operated an illicit distillery in Talladega county, Alabama, in the fall of 1895.

5. The said Court erred in permitting the District Attorney, for the United States, to exhibit said still to the jury, and to set said still and stilling apparatus up in the presence of the jury.

6. The said Court erred in allowing the said witness to examine said still and say it was the same still that she had seen the plaintiffs in error, aforesaid, operating in Talladega county, Alabama, in the fall of 1895.

7. The said Court erred in allowing the still, cap and worm, to remain in the presence of the jury throughout the trial of the case.

8. The Court erred in permitting the witness, B. W. Bell, to testify that the still and apparatus was found near the dwelling house of Walter W. Motes, one of the plaintiffs in error.

9. The Court erred in permitting the deposition of William Robert Taylor to be read in evidence against Columbus W. Motes, Dodge Blankenship, John Littlejohn, Walter W. Motes and Jasper Robinson.

10. The Court erred in allowing the deposition of William Robert Taylor, given upon the trial of the other plaintiffs in error, Columbus W. Motes, Dodge Blankenship and John Littlejohn, to be read in evidence against the other plaintiffs in error, Walter W. Motes and Jasper Robinson.

11. The Court erred in allowing the witness, Mrs. Mary Taylor, wife of William Robert Taylor, whose deposition and confession of guilt had been made, to testify against his alleged accomplices, the other plaintiffs in error, that she had heard Columbus W. Motes agree with her said husband to kill W. A. Thompson the next day to prevent him from being a witness against them.

12. The said Court erred in allowing the jury to look through the microscope at the alleged blood and brains.

13. The Court erred in allowing the District Attorney to put the question to the plaintiffs in error, while they were testifying, each for himself as to whether or not they had been guilty of illicit distilling previous

to the time said Thompson was killed.

14. The Court erred in overruling the motion of plaintiffs in error in arrest of the judgment of the court.

15. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (1) "If the jury believe the evidence, they will find the defendants not guilty."

16. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (2) "If the jury believe the evidence they will find the defendant, Walter Motes, not guilty."

17. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error: (3) "If the jury believe the evidence, they will find the defendant Jasper Robinson, not guilty."

18. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (4) "A probability of the innocence of the defendants, Dodge Blankenship, John Littlejohn, Walter Motes and Jasper Robinson, is a just foundation for a reasonable doubt of their guilt, and is therefore sufficient to entitle them to a verdict of not guilty."

19. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (5) "The court charges the jury that before a conspiracy can be established and made out, they must be satisfied beyond a reasonable doubt that there was an agreement by and between them to commit the offense charged in the indictment, and that though they may find that this agreement was made by some of the defendants, yet if they were not present and neither aided or abetted in the consummation of the offense, they must find the defendants not guilty."

20. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (6) "To be a citizen of the United States means that a person has been born or naturalized in the United States; mere proof of the fact that a person has had his residence within the United States is not sufficient to make him a citizen of the United States, within the meaning of the law."

21. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (7) "A person may

reside in Talladega County, Alabama, or in any other place in the United States, and not be a citizen of the United States within the meaning of the law, and before the jury can convict the defendants in this case, they must believe, from the evidence in the case, beyond a reasonable doubt and to a moral certainty, that W. A. Thompson was not only a resident of Talladega County, Alabama, but that he was also a citizen of the United States, entitled to all of the civil and political rights to which a citizen may be entitled under the Constitution and laws of the United States.

22. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (8) "The court charges the jury that if the weaker and less satisfactory evidence is relied on in support of a fact, when it is apparent to the Court and jury that proof of a more direct and explicit character was within the power of the Government, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed that if the more perfect exposition had been given, it would have laid open the deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

23. The Court erred in refusing to give to the jury the following instruction requested by plaintiffs in error, viz.: (9) "That if the jury believe from the evidence that Robert Taylor and Columbus Motes were the only defendants that did conspire to kill Thompson on the account of exercising the right of a citizen of the United States in becoming a witness in the Court of the United States, then they will find Walter Motes, Jasper Robinson, John Littlejohn and Mark (Dodge?) Blankenship not guilty.

24. The Court erred in refusing to give to the jury the following instruction, viz.: (10) "That although the jury may believe, from the evidence, that W. A. Thompson came to his death at the hands of the defendants, this is not sufficient to convict the defendants as charged. That they must further find from the evidence that the defendants, each of them, did conspire in manner and form as charged in the indictment; and if they fail to find that there was a conspiracy between the defend-

ants as charged in the indictment, they must find the defendants not guilty."

25. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (11) "The Court charges the jury that the testimony of William Robert Taylor, taken before the Commissioner in the preliminary trial, cannot be considered by them as evidence against the defendants not on trial at the time at which the testimony was taken."

26. The Court erred in refusing to give to the jury the following instruction, viz.: (12) "If the jury find from the evidence that W. A. Thompson has been convicted of an offense punishable by imprisonment in the penitentiary, and sentenced to serve a term of eighteen months in the penitentiray, they will find all of the defendants not guilty."

27. The Court erred in refusing to give to the jury the following instruction requested by plaintiffs in error, viz.: (13) "If the jury find from the evidence that W. A. Thompson has been convicted of an offense punishable by imprisonment in the penitentiary, they will find all of the defendants not guilty.

28. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (14) "If the jury believe from the evidence that W. A. Thompson was killed because he was a witness in the District Court of the United States, and they should find further that these defendants, or either of them, are guilty of the murder of Thompson, it is then the duty of the jury to find such defendant or defendants guilty as charged in the seventh and last count in the indictment.

29. The sentence is illegal.

Argument and Authorities.

First Error. The plaintiffs in error were each entitled to challenge eleven (11) jurors peremptorily.

Criminal Code of Ala., Sec. 5015.

Second Error. The Government was entitled to but four peremptory challenges if the offense charged was not capital.

Criminal Code of Ala., Sec. 5015.

The conspiracy charged in the indictment in the first counts thereof is not a capital offense.

U. S. Rev. Statutes, Sec. 5508.

The seventh and last count of the indictment charges the offense of murder while pursuing a conspiracy and the statute does not in terms prescribe a penalty, but refers that to the Alabama law.

U. S. Rev. Statutes, Sec. 5509.

In Alabama murder is a capital offense if in the first degree.

Criminal Code of Ala., Sec. 4858.

Under this count the Government would be entitled to fourteen (14) peremptory challenges, and the plaintiffs in error eleven (11) each.

Under the counts not charging a capital offense, the plaintiffs in error were entitled to only eight peremptory challenges.

Criminal Code of Ala., Section 5015.

There was a misjoinder of counts in the indictment, which would render it bad at common law. The criminal code of Alabama permits a joinder in one count "when the offenses are of the same character, and subject to the same punishment."

Criminal Code Ala., Section 4913.

It is uncertain from this indictment how many peremptory challenges the Government and the plaintiffs in error were entitled to. It is believed that the subject of challenges is here governed by the Alabama Statute.

The 3d, 4th, 5th, 6th, 7th, 8th and 13th assignments of error should be considered together. The government should not have been allowed to

prejudice the jury unnecessarily by offering evidence of other offenses committed by plaintiffs in error at distant and different times, nor exhibit the alleged instrumentality of said offense, to-wit: the still and accompanying apparatus, nor permitted the same to be offered in evidence, nor to remain in evidence. "It is a dangerous species of evidence," says Mr. Rice, in his work in criminal evidence, "not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime, by proof that he is guilty of another. For this reason it is essential to the rights of the accused that when such evidence is admitted it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose, for which it is competent."

Rice, Crim. Ev., p. 218, Sec. 157.
Roscoe, Crim Ev., 90, 94.
Rex v. Ball, Russ & R., 132.
Com v. Eastman, 1 Cush., 189, 48 Am., Dec., 596.

"When such evidence is admitted," etc., says the text of Mr. Rice.

When ought evidence of other offenses be allowed against a defendant? It is believed to be only when it serves to illustrate and throw light on the offense charged, and is indispensable. In the case at bar it was permissable, perhaps, to show a motive on the part of plaintiffs in error, which might cause them to kill the deceased, and pursuant to this end the government was permitted to show that the deceased had informed on the plaintiffs in error, charging them with illicit distilling, and was a witness against them in the prosecution pending at the time of W. A. Thompson's death.

That was surely sufficient, and the enquiry should have been stopped there. It was error to go beyond this and offer evidence of the particular offense so committed and then dramatize it, as it were, by using the courtroom as a stage and the jurors for an audience. This was bad practice—a travesty upon judicial proceedings.

9th, 10th, 22nd, and 25th Assignments of Error. The deposition of Taylor given on a preliminary trial of some of these defendants should not have been read against any of the plaintiffs in error, because it was not shown that the witness who gave the deposition was either dead, ill, or insane, or beyond the jurisdiction of the court. No predicate had been laid. Special Officer B. W. Bell took the witness out of jail two days before court, and although under indictment for murder, he allowed him to sleep at the hotel with his family, and was free to go and come about the court-house; was seen in the corridors one hour before called as a witness. (See Bell's testimony, Record, p. 17.) Bell was an officer of the government who "worked this case up," to use the expressive vernacular of the witness. He obtained a confession from Taylor in the approved way, and Taylor implicated others. Bell says he promised Taylor nothing, but he in fact was guilty of a voluntary escape, and let Taylor walk away, knowing that he had this deposition now complained of. The deposition is subject to the infirmities raised in the 22d assignment of error, charge No. 8. The deposition was not competent evidence against any of the plaintiffs in error, because it was not shown that the witness, Taylor, was dead, sick or beyond the jurisdiction of the court. Charge No. 8 should have been given.

Brown v. Com., 73 Pa., 321; 13 Am. Rep., 740.
State v. Chambers, 43 La. Am., 1108.
Rice on Crim. Ev., Ch. 33, p. 379 et seq., authorities cited there.

The deposition was certainly not competent against Walter W. Motes and Jasper Robinson, for the reasons assigned to its incompetency generally, and against any of the plaintiffs in error, and for the additional reasons that these two, Walter W. Motes and Jasper Robinson, were arrested on the same day and brought before the same Commissioner on the same day, charged with the same offense with the other four (4) plaintiffs in error who were being tried by the Commissioner. It does not appear in all, or any of the evidence that these two, Walter W. Motes and Jasper Robinson, were ever put upon a preliminary trial and given an opportunity to cross-examine the witness, Taylor. They were never notified of

such fact, if they were being tried.

The Commissioner at the trial testified that their case was postponed. Again he says there was no separate trial of these two. (Record, pages 18 and 19.) It does not appear that they had counsel to assist them, or were heard in their own behalf.

Amd. Const U. S., Art. 6.
U. S. Rev. Statute, Sec. 1034.

It does not appear that Walter W. Motes and Jasper Robinson were continuously in court during the preliminary trial and heard all that Taylor said against them. It does not appear that they did have a reasonable length of time in which to employ counsel or prepare a defense. They were arrested in the midst of the preliminary trial and charged with murder. The law of human nature would warrant the presumption that they were confused, terrorized and unable to cross-examine a witness. They were not confronted with the witness against them.

The trial of the other four (4) had been in progress two (2) days when the last two (2) were arrested. They were not permitted to see the manner and circumstance of the witness; they being witnesses themselves, it was presumed they were under the rule.

The following eloquent exposition of the importance of this doctrine is here quoted from Mr. Rice: "This subject of depositions received in criminal cases is freighted with grave constitutional rights. The organic law has guaranteed a well recognized prerogative, the manifest justice of which it was the just pride of the civil law to have established. That law provides that no person shall be convicted of a heinous criminal offense—pilloried at the bar of opinion, deprived of his fair name and reputation, despoiled of his property, outraged in every sensibility by any law which admits in evidence the irresponsible, ex parte allegation of his most virulent traducers under the guise of a deposition."

Rice on Evidence, Vol. 3, p. 285.

And the exceptionally able dissenting opinion of Mr. Justice Brady there eulogized is pressed upon the attention of the court.

11th Error. The evidence must show a conspiracy to have existed before the declarations of a co-conspirator can be received against the confederates.

Rice on Crim. Ev., page 903.
Roscoe's Crim. Ev., 5 Am. Ed., p. 414.

Mrs. Mary Taylor and her husband were one in law. What he could not do, she could not. Her testimony as against other defendants than Columbus W. Motes was illegal. If she heard Columbus Motes conspire with her husband to kill Thompson, the testimony, if legal at all, should have been limited as to Columbus Motes. Aside from the idea of a conspiracy, it is clear that the declarations or threats of the one defendant are not competent evidence against other defendants.

Besides, she was the wife of a conspirator who had pleaded guilty. Could she testify against her husband? The court should have excluded her evidence, or, admitting it, limited it to the persons conspiring or threatening to kill Thompson. There was no proof of a conspiracy as to other defendants, except the objectionable and illegal deposition of Taylor above mentioned.

12th Error. The practice has undoubtedly obtained of receiving expert and opinion evidence to identify blood in cases of homicide as human blood. Dr. Wharton, with rare felicity, touches the very pith and marrow of this entire subject in Sec. 777 of his Criminal Evidence:

"Scarcely a case arises," says this learned author, "when this issue is material, in which experts have not appeared ready to identify dried blood as human, and by this process supply a link on which a conviction of a capital offense may be made to rest.

It is perhaps a minor matter that in this way immense expenses are heaped, not only on the State, but on the accused. Experts are brought from a distance by the State at great cost, protracted experiments are made by them, afterwards to be detailed to the jury, and testimony is added which the defendant must meet at the peril of his life. Controvert it, he readily may, if he can procure the means, for the great weight of authority, as will presently be seen, is that such identification cannot be accurately determined. But to procure this testimony may be impossible for him, unless the prosecution assume the expense, which it often

is either unwilling or unable to do. This amounts to a perversion of justice. But this is not the chief objection. Supposing that experts are obtained so as to fully exhibit to the jury both sides of this vexed question, and the case goes to the jury on their testimony, what then? Is there not danger that the jury may regard the question as one determined, not by ascertainable physical laws, but by their own discretion, or on the authority of particular experts. It would seem, in view of these dangers and in view of the more recent explorations of scientists who have viewed the question, not as advocates retained by a particular party, but as dispassionate investigators, that the time has now arrived in which it is the duty of courts to advise jurors in all cases in which it is proposed, to rest a conviction on the identification of certain blood stains as human, that as a matter of fact no such identification can be made out beyond a reasonable doubt. That stains look like blood may be proved by expert and non-expert; that they are dried human blood can be satisfactorily proved by no one."

That the jury may regard the question as one determined by their own discretion and not by natural laws is one of the grounds upon which Dr. Wharton bases his objection, and yet in the case at bar the jury were practically invited to look through the microscope, which they did, and of course draw conclusions of their own, and this was assigned as error. (See Record, pages 24 and 25.)

Mr. Rogers, in his well-known work on Expert Testimony, page 141, says: "When blood is dried upon clothing and it is necessary to extract the corpuscles by means of a liquid of a different nature from the semin, we cannot rely on slight fractional differences, since we cannot be sure that corpuscles, after having once dried, will ever acquire, in a foreign liquid, the exact size which they had in service. Medical evidence must therefore be based on mere speculation. * * *

"There are no certain methods of distinguishing microscopically or chemically the blood of a human being from that of an animal when it has once dried on an article of clothing."

14th Error. There are no crimes against the United States, except those created by act of Congress, Section 5508 of the Revised Statutes of the United States, creates and defines a crime based upon the con-

stitutional right of the Congress to prevent and punish conspiracies..

The Constitution of Alabama declares "that no person shall be accused, or arrested, or detained except in cases ascertained by law, and according to the forms which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied . (Art. I, Sec. 8.) This is doubtless the law of all English-speaking countries. .

Section 5509 of the Revised Statutes of the United States, provides:

"Sec. 5509. If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed."

If, while violating one law a "felony or misdemeanor is committed," says the statute, and the question is whether the words "felony or misdemeanor" mean such under the laws of the United States or State, when the words recur they refer expressly to State law in fixing the punishment. Congress cannot create a crime against the United States by using the words "felony or misdemeanor" under State law. Therefore the interpretation must be, that the words "felony or misdemeanor" refer to such crimes as are fixed by federal law, and as murder per se, is not within the United States law, it cannot be indirectly brought within them by being tacked on to a charge of conspiracy. If it be that the words "felony or misdemeanor" mean such under State law, it seems clear that Congress is without the power to create a crime against the United States by mere reference to State laws already existing. Granting that this could be done, still the Congress should make a substantive crime, defining it. It is urged that Section 5509 is unconstitutional and void for uncertainty. The defendants were convicted of murder, an impossible crime under this Section 5509. It may be that the United States can assume jurisdiction over the crime of murder when committed pursuant to a conspiracy, but must define each crime, and if so, then of all the crimes in the catalogue. If this can be done, it is here urged that it has not been done under Section 5509. No substantive crime is thereby created or defined by law, and such would be necessary

in an act of Congress.

15th, 16th and 17th Errors. The counts in the indictment are for conspiracy to deprive a citizen, etc., and for a murder alleged to have been committed pursuant to a conspiracy. There was no proof of conspiracy among all of the plaintiffs in error, and there was no legal proof of a conspiracy among some of the plaintiffs in error. The ex parte affidavit of Taylor on the preliminary trial was against all of the plaintiffs in error, and if competent, would prove a conspiracy among all of the plaintiffs in error; but if rejected as incompetent, the only other evidence of a conspiracy included Columbus W. Motes and William Robert Taylor, and this was shown only by Mrs. Mary Taylor, wife of William Robert Taylor, heretofore argued as incompetent as testimony against her husband and his alleged co-conspirator. If this also be rejected, the charge directing a verdict for all of the plaintiffs in error should have been given, or for some of them named in charges, to-wit: 16 and 17.

18th Error. A probability of the innocence of the plaintiffs in error is the equivalent of the proposition that there were more chances that they were innocent than that they were guilty, and this ascertained from the evidence would be a proper foundation for a reasonable doubt.

Cohen v. State, 50 Ala., 108.

Bain v. State, 74 Ala., 38.

Winslow v. State, 76 Ala., 42.

19th Error. The charge there refused is sumbitted without comm.....

20th, 21st and 26th Errors. The charge refused defined for the jury who was a citizen of the United States. Ordinarily in civil matters a presumption of citizenship would arise from proof of mere residence, but in a penal statute, when the citizenship of the person injured is of the essence of the crime charged, it should be proven as laid in the indictment. It was of the very essence of the crime created by Section 5508 of the Revised Statutes. At common law time was a material ingredient of an offense charged in an indictment, and it must have been proved as stated. The statute in Alabama obviates this by declaring

that the time may be alleged generally, as "before the finding of the indictment unless time is a material ingredient of the offense."

Crim. Code of Ala., Sec. 4901.

The burden of proof was on the Government to prove every material allegation of the indictment. Citizenship should have been proved. The only evidence was, that deceased was in the United States, in Alabama.

22nd Error. This charge was discussed with errors Nos. 9, 10, 22 and 25.

23rd Error. The charge was the equivalent of the proposition, that if Walter W. Motes, Jasper Robinson, John Littlejohn and Dodge Blankenship, did not conspire to deprive W. A. Thompson of a right, as a citizen, and did not conspire to kill him pursuant thereto, that they were not guilty. Further, that if Columbus W. Motes and Taylor did so conspire, they would alone be guilty. This charge was supported by the testimony of Mary Taylor and Columbus W. Motes, and should have been given.

24th Error. Of course the charge must have been proven as laid, and the United States law did not include bare murder dissociated from a conspiracy, as charged in the indictment. This charge should have been given.

25th Error. This was argued in connection with the 9th, 10th, 22nd and 25th assignments of error relating to the several phases in which the ex parte affidavit of Taylor arose in the case at bar.

26th and 27th Errors. This charge refers to citizenship, and the burden of proof. It only remains to be added that to be a citizen of the United States one must be a citizen of a State, with political and civil rights, and the converse is true. The Constitution of the United States provides "That citizens of each State shall be entitled to all of the privileges and immunities of citizens of the several States."

Constitution, Art. IV, Sec. 2.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside.

Amendments, Art. XIV., Sec. 1.

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

Amendments Constitution, Art. XIV., Sec. 1.

All persons resident in this State, born in the United States or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared to be citizens of Alabama, possessing equal civil and political rights.

Constitution of Alabama, Art. I., Sec. 2.

In Alabama the Constitution provides that "Those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary, shall not be permitted to vote or hold office."

Constitution of Alabama, Art. VIII., Sec. 3.
Washington v. State, 75 Ala., 382.
Anderson v. State, 72 Ala., 187.
Gaudy v .State, 82 Ala., 61; 86 Ala., 20.

The proof showed that the deceased had been convicted of a crime prior to his death, or this alleged conspiracy, and sentenced to eighteen months in the penitentiary. (See Record, page 25.) It made no difference whether State or Federal Court. (See Code of Ala., Sec. 1557.)

Now the question is, since the deceased had lost his citizenship in the State of Alabama, by reason of his conviction, did his citizenship of the United States survive and exist at the time of his death or the formation of the alleged conspiracy? It would seem that he could not remain in the anomalous position of still being a citizen of the United States and not a citizen of the State of Alabama. The charges should have been given.

28th Error. This charge raises the question, whether or not, since a murder followed a conspiracy, the smaller crime was not merged in the greater. Was it not the duty of the jury to convict of murder if of anything?

29th Error. The sentence was illegal. See Record, page 37, for order pronouncing sentence of life imprisonment.) It is insisted that the Court had no authority to sentence the plaintiffs in error for a term longer than ten years. (See Sections 5508 and 5509 R. S.)

Plaintiffs in error respectfully submit that for the many errors of the court below, the cause should be reversed, and on account of the sentence of the Court being illegal, the plaintiffs in error should be discharged from custody.

LEE COWART,
Counsel for Plaintiffs in Error.

Supreme Court U.S.
APR 30 1900

No. 257.

Brief of Atty for Def't in Error.

Filed April 30, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

COLUMBUS WINCHESTER MOTES, alias Chess Motes, Walter W. Motes, Jasper Robinson, John Littlepoha, and Mark Grant Blankenship, alias Dodge Blankenship alias Dodge Blankenship, plaintiffs in error,

vs.

THE UNITED STATES.

No. 257.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR.

JAMES E. BOYD,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

COLUMBUS WINCHESTER MOTES, ALIAS Chess Motes, Walter W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias Dodge Blankenship, alias Dodger Blankenship, plaintiffs in error,

v.

THE UNITED STATES.

No. 257.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The plaintiffs in error, Columbus Winchester Motes, alias Chess Motes, Walter W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias

Dodge Blankenship, alias Dodger Blankenship, together with one William Robert Taylor, were indicted at September term, 1898, of the circuit court of the United States for the northern district of Alabama and were tried at the said term. William Robert Taylor entered a plea of guilty and the other defendants, having entered their plea of not guilty, were put upon their trial and the following verdict was rendered by the jury (Record, p. 36):

> We, the jury, find the defendants, Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, guilty as charged in the indictment. September 29, 1898. We, the jury, ask the mercy of the court for the four defendants, Walter W. Motes, Jasper Robinson, John Littlejohn, Mark Grant Blankenship, and especially for John Littlejohn and Jasper Robinson.

The judgment of the court was that each of the said persons convicted by the jury should be imprisoned in the penitentiary for the period of his natural life (record, p. 37).

(In order to save time and space, the full given names and aliases as they appear in the indictment will be omitted in the further statement and argument of the case.)

The indictment, which will be found on pages 1, 2, 3, 4, 5, 6, and 7 of the record, in substance charges that C. W. Motes, Walter W. Motes, William R. Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, in violation of section 5508 of the Revised Statutes of the United States, conspired to injure, oppress, threaten, and intimidate one W. A. Thompson, a citizen

of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, namely, the right and privilege of reporting to a United States commissioner the fact that these said parties had violated the criminal laws of the United States by carrying on the business of illicit distillers of spirituous liquors; and also in the exercise of the right and privilege of reporting the said violation to a deputy collector of internal revenue of the United States. The indictment further charges that the said parties conspired to injure, oppress, threaten, and intimidate the said Thompson, because of the fact that he had exercised the right and privilege under the Constitution and laws of the United States of being a witness against these said parties upon a charge of a violation of the internal-revenue laws of the United States before the grand jury in the circuit court of the United States. It is charged severally in the counts of the indictment that in furtherance of the said conspiracy, and in carrying out the same, the said parties unlawfully, wilfully, premeditatedly, deliberately, and with malice aforethought, killed and murdered the said Thompson. For exceptions taken and noted during the trial and assignments of error thereon the case is brought to this court by writ of error for review, and the plaintiffs in error are the parties severally named in the indictment, with the exception of William Robert Taylor, who, as before stated, entered a plea of guilty before the trial commenced.

ARGUMENT.

The plaintiffs in error did not comply with section 997, Revised Statutes, nor rule 35 of the Supreme Court, and file with the petition for writ of error an assignment of errors in the court below, nor is there any assignment of errors incorporated in the transcript sent up or in the record as printed. I am left, therefore, to adopt the order of argument which is taken in the brief filed for plaintiffs in error.

I think, however, that the first question which arises in the case (which is one not discussed by the plaintiff in error) is whether, under the law, this case can be brought by writ of error direct from the circuit court in which it was tried to the Supreme Court, or whether the judgment pronounced by the circuit court on the verdict is that commanded by the law. The circuit court of appeals act (26 Stat., 827) provides for appeals or writs of error from the district courts or existing circuit courts direct to the Supreme Court in cases of conviction of a capital or otherwise infamous crime. But the words "or otherwise infamous" were subsequently, by act of January 20, 1897 (29 Stat., 492), stricken out, leaving the law to the effect that no such appeals or writs of error can be had except in cases of conviction of capital crime.

The indictment here is under section 5508 of the Revised Statutes, and the violation of the laws of the United States charged is a conspiracy to injure, oppress, threaten, and intimidate Thompson in the exercise and enjoyment of a right secured to him by the Constitution and laws of

the United States, and, secondly, to injure, oppress, threaten, or intimidate him because he had exercised a right or privilege secured to him by the Constitution and laws of the United States.

It is alleged further in the indictment that in carrying out the conspiracy to injure, etc., the conspirators unlawfully, willfully, premeditatedly, deliberately, and with malice aforethought killed and murdered Thompson. This last allegation is drafted under the provisions of section 5509 of the Revised Statutes, and relates solely to the measure of punishment.

The crime for which the parties charged could be convicted under this indictment is the conspiracy denounced by section 5508, but in case the indictment contains averments to that effect the jury is authorized to go further and find if the conspirators, in furtherance of the conspiracy, have committed acts which constitute a misdemeanor or felony under the laws of the State in which the conspiracy is alleged. In case of such finding the punishment prescribed for the conspiracy can extend to that provided by the State laws for the punishment of the misdemeanor or felony so found to have been committed. In order that I may be fully understood, I will reiterate that the provisions of section 5509 do not create any violation of the criminal laws of the United States, but simply provide for the punishment of offenders under section 5508 in case certain conditions are found to exist in connection with a conspiracy described in the latter section.

The circuit court of the United States sitting in the State of Alabama has no jurisdiction to indict or to try

a person for murder committed in said State; this jurisdiction belongs exclusively to the courts of the State of Alabama. The extent of the jurisdiction of the circuit court in a case like the one under consideration is to indict and try the parties for conspiracy and to ascertain if any act committed in furtherance of the conspiracy constitutes a felony or misdemeanor under the laws of the State in which the conspiracy is alleged. The finding of the jury as to the latter does not change the character of the crime only in so far as it relates to the punishment to be inflicted. The crime is still that of conspiracy under section 5508, and the additional finding of the jury simply has the effect of empowering the court to go beyond the punishment prescribed in section 5508 and inflict such as is provided by a State law. Now, apply this to the case here. The plaintiffs in error were indicted for a conspiracy, a crime under the laws of the United States; but in order to determine the punishment in case of conviction, it is charged that in the act of committing the crime of conspiracy they also committed murder, which is a felony under the laws of Alabama. Therefore, if the jury found by the verdict that the parties were guilty as charged in the indictment, the effect was to convict for conspiracy, the punishment for which is that attaching to the crime of murder under the State laws of Alabama.

Conspiracy under section 5508, Revised Statutes, is not a capital crime. "A capital crime," says Bouvier in his Law Dictionary, "is one for which the punishment of death is inflicted;" and he also defines "capital punishment" to

be "the punishment of death." The American and English Encyclopedia of Law, vol. 2, page 728, under the head of "Capital," in so far as it relates to crime, gives the definition "punishable with death; affecting life." The crime is therefore not capital unless it is one in which the death penalty may be inflicted.

It will be observed that in providing for writ of error or appeal from the district and circuit courts to the Supreme Court the right is made to turn upon *the conviction* and not upon the charge in the indictment, for, as I have before stated, the law as enacted in the circuit court of appeals act and afterwards amended reads as follows:

"In cases of *conviction* of a capital crime." A *conviction* in a judicial proceeding is an adjudication that the person accused is guilty. "The word conviction ordinarily signifies the finding of a jury by verdict that the prisoner is guilty." (American and English Encyclopedia of Law, vol. 7, p. 497.) In the notes under the definition above given is cited a decision to the effect that "a man is convicted when he is found guilty or confesses the crime."

The decisions are all to the effect that in order to constitute a conviction the accused must be found guilty by the verdict of a jury or confess his guilt. (See cases cited in American and English Encyclopedia of Law, vol. 7, under head of "Conviction.") In *United States* v. *Gibert*, 2 Sumn. (U. S.), 19 (also reported in 25 Fed. Cas., 1287), it is held that a verdict or confession of guilt is a conviction. On page 1295, 25 Fed. Cas., in rendering

the opinion in the Gibert case, Mr. Justice Story says: "Conviction does not mean the judgment passed upon a verdict; '*but if the jury find him (the party) guilty, he is then said to be convicted of the crime whereof he stands indicted.*'"

So, then, it depends in this case upon the question as to whether or not the plaintiffs in error were convicted of a capital crime—that is, Was there a conviction of a crime which, by virtue of such conviction, was punishable with death? If not, then, under the law which authorizes a writ of error direct to the Supreme Court only in cases of conviction of capital crime, this writ of error will not lie.

This brings us then to consider the character of the conviction by the verdict of the jury in this case, and the first question which seems to occur is as to whether the statute law of the State of Alabama relative to indictments and trials for murder has any application to this case. In order to lay the point fully before the court, I give the following sections from the Code of Alabama, Vol. 2 (Crim.):

> SEC. 4854. Every homicide, perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to

deprive any particular person of life, is murder in the first degree; and every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree.

SEC. 4857. When the jury find the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or the second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly.

SEC. 4858. Any person, who is guilty of murder in the first degree, must, on conviction, suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury; and any person, who is guilty of murder in the second degree, must, on conviction, be imprisoned in the penitentiary for not less than ten years, at the discretion of the jury.

By section 4854 homicides which constitute murder are divided into murder of the first degree and murder of the second degree; and section 5847 makes it incumbent upon the jury finding a defendant guilty under an indictment for murder to ascertain by their verdict whether it is murder in the first or murder in the second degree. Section 4858 defines the punishment for murder in the first degree and for murder in the second degree, that for murder in the first degree being death or imprisonment in the penitentiary for life, at the discretion of the jury, and for the second degree, imprisonment in the penitentiary for not less than ten years, at the discretion of the jury. If, therefore, under the Alabama

law, a person is convicted of murder in the first degree, the punishment is death, unless the jury in the exercise of the discretion conferred upon it by the statute elects to designate imprisonment in the penitentiary for life.

Proceeding on the assumption that punishment for a felony under the laws of Alabama is to be the measure of punishment for a crime against the United States, and that to ascertain the extent of punishment for such felony the trial must follow the requirements of the Alabama statute, we come to the point of inquiry as to the effect of the verdict of the jury rendered in this case.

The verdict is given before in the statement of the case, but in order to have it immediately before the court I reproduce it from page 36 of the record:

> We, the jury, find the defendants, Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, guilty as charged in the indictment. September 29, 1898. We, the jury, ask the mercy of the court for the four defendants, Walter W. Motes, Jasper Robinson, John Littlejohn, Mark Grant Blankenship, and especially for John Littlejohn and Jasper Robinson.

As before stated, the indictment charges the parties named with conspiracy under section 5508, Revised Statutes, to injure W. A. Thompson in the enjoyment of a right and privilege under the Constitution and laws of the United States, and that, in furtherance of the conspiracy, they *unlawfully, willfully, premeditatedly, deliberately, and with malice aforethought*, killed and murdered the said W. A. Thompson. The jury by their verdict said that these parties were guilty as charged in the in-

dictment; that is, that they conspired to injure Thompson in violation of section 5508, Revised Statutes, and that in the act of carrying out the conspiracy they murdered him. Upon that verdict the court sentenced the parties severally to imprisonment in the penitentiary for life. If such was the judgment which the court was required to pass under the verdict, then I contend that a writ of error could not be taken directly to the Supreme Court; and this upon the ground that if, by the verdict, the court was precluded from passing the death sentence, then it was not a case in which the punishment of death could be inflicted and was therefore not a conviction of a capital crime.

The jury did not follow the requirements of section 4857 of the Alabama statutes and ascertain whether the parties had committed murder in the first or in the second degree, nor did the jury exercise the discretion conferred by section 4858 and prescribe imprisonment in the penitentiary for life in lieu of the death penalty. The indictment alleges sufficient facts to constitute murder in the first degree, and when the jury returned a verdict of guilty as charged in the indictment they said in effect that these allegations were true. Then, how did the jury qualify the verdict so as to relieve the court of the duty of entering judgment that the convicted parties should be put to death, unless the recommendation for mercy, which is a part of the verdict, be construed into a substantial compliance with the requirements of the statute making it incumbent upon the jury by their verdict to determine as to whether

capital punishment or imprisonment for life shall be inflicted? If we take this view of it, then the result is that four of the parties, namely, Walter W. Motes, Jasper Robinson, John Littlejohn, and Mark Blankenship, should have been sentenced to imprisonment for life, and Columbus W. Motes, who was not recommended for mercy, should have been sentenced to death. In such case, the last named would be entitled under the law to sue out a writ of error directly to the Supreme Court, because his conviction would be that of a capital crime. The others would not be entitled to come directly to the Supreme Court, because the punishment of death could not be inflicted so far as they are concerned.

If, however, the statute law of Alabama relative to the degrees of murder and the duties of juries in murder trials does not apply in this case, then the question arises whether sections 5508 and 5509 of the Revised Statutes, taken together, make conspiracy in which murder is committed a capital felony under the laws of the United States. In order to have the question immediately before us, I copy the two sections referred to:

> SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right so secured, they shall be fined not more than $5,000 and imprisonment not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of

honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 5509. If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

These two statutes together, in case of conspiracy and murder, appear to be capable of the following construction: If two or more persons conspire to injure a citizen in the enjoyment of a right or privilege under the Constitution and laws of the United States, or to injure him because he has exercised such right, and in furtherance of such conspiracy shall commit the crime of murder, such person shall, in case of conviction, be punished with such punishment as is attached to murder in the State in which the offense is committed.

If this is a proper construction of the sections, then conspiracy and murder, in a State where the punishment of murder is death, constitute a capital crime under the laws of the United States, and in a State where capital punishment is not inflicted for murder, the crime of conspiracy and murder under the United States statutes would not be capital. In Alabama, murder in the first degree is punishable with death. The charge in the indictment in our case is conspiracy and murder, and the averments as to the murder follow the Alabama statute and state facts sufficient to charge murder in the first degree, and are also sufficient to charge murder at common law.

If, therefore, the duty of specifying by the verdict the punishment to be inflicted, as prescribed by the Alabama statute, did not devolve upon a jury sitting in the Federal court, there is but one view, it seems to me, to take of the situation, and that is, that the verdict as rendered by the jury convicted the parties indicted of a crime which is punishable under the laws of Alabama and also the laws of the United States with death, and it was the duty of the court, upon the rendition of this verdict, to pass judgment accordingly. The jury did not relieve the court of this duty by qualifying the verdict, nor authorize it to pass sentence for a less punishment. If this position be tenable, then the proper judgment in this case has not been passed upon the plaintiffs in error by the trial court, and the case should be remanded, with directions to enter judgment pronouncing the death penalty, as required by law.

I am led to present these views to the court because I do not think the judgment of the court below in this case is that which the law demands and the plaintiffs in error deserve. The killing of Thompson, according to the evidence for the prosecution and the admission of Columbus W. Motes, one of the prisoners who was examined on the trial as a witness for his codefendants (see record, pp. 25, 26), was a premeditated, deliberate, and cold-blooded murder—a murder without a single mitigating circumstance. Thompson had simply performed a duty devolving on him as a law-abiding citizen by reporting a violation of the criminal laws of the United States. He had obeyed the mandate of the law, and had testified before a grand jury as a witness against

persons who were charged with crime. Because of this action on the part of Thompson, his death was decreed by the gang of ruffians against whom his testimony was directed, and he was waylaid by them and murdered in a most cowardly manner. The purpose of the conspirators in taking the life of Thompson was, no doubt, two-fold—first, to be rid of his evidence in the indictment against them, and, second, to deter other citizens in that community from reporting violations of the internal-revenue laws, or testifying against persons charged with such violations.

Concluding upon these points, I wish to restate the position that if the verdict of the jury in this case took away from the court the right to pronounce the death sentence, then there was not a conviction of a capital crime and no writ of error could be brought directly to the Supreme Court, and the writ of error here ought to be dismissed. On the other hand, if the indictment charges a capital crime; that is, a conspiracy in which a murder was committed by the accused—a murder in the first degree under the statutes of Alabama, and a murder at common law, for both of which death is the punishment prescribed by law, the verdict being a general one of "guilty as charged in the indictment," the proper sentence of the court upon the verdict of guilty was the punishment of death. If the jury had qualified the verdict as provided by the act of January 15, 1897 (29 Stat., 487), by adding "without capital punishment," it might have been held sufficient to authorize the judgment of imprisonment for life; and yet, if the crime is conspiracy, to be punished as murder, the provisions of

that act would not apply, because they are confined to murder and rape. But this view of it need not be considered, for the jury did not undertake to qualify the verdict. They only added a recommendation for mercy as to four of the defendants.

The power of this court to remand a case for proper judgment is well settled. (*Ballew* v. *United States*, 160 U. S., 187, and cases cited in the opinion.)

POINTS MADE IN BRIEF OF PLAINTIFFS IN ERROR.

I now come to the questions raised by exceptions taken on the trial and assignments of error based thereon, discussed in the brief filed by counsel for plaintiffs in error.

I and II. *Challenges of jurors.*—The contention on the part of the plaintiffs in error is that they were entitled to the number of peremptory challenges in the selection of the jury as provided by the criminal code of Alabama.

I do not think that this question requires lengthy argument on the part of the United States. The number of peremptory challenges allowed by the court (record, pp. 14, 15) was five for the Government and twenty for the defendants. Section 819, Revised Statutes, contains the following provisions:

> When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. * * * and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section.

The indictment in this case, as before insisted, charges a capital offense, and the court followed literally the law with regard to peremptory challenges. The counsel for plaintiffs in error takes the position that the challenges should have been regulated by the laws of Alabama, and, further, that the conspiracy charged in the indictment, in the first counts thereof, is not a capital offense.

I will not take the time of the court to discuss these questions further than to direct attention to the provisions of section 819 above quoted and to the offense charged in the indictment.

III, IV, V, VI, VII, and VIII. *Admission of testimony tending to show that plaintiffs in error had operated an illicit distillery.*

The theory of the prosecution was that the plaintiffs in error conspired to injure Thompson because he had reported them for illicit distilling and had also become a witness against them before the grand jury and was a witness indorsed upon an indictment pending against them for carrying on the business of distillers of spirituous liquors in violation of the laws of the United States. Evidence going to prove that the parties were guilty of the offense for which Thompson had reported them, and of which they stood charged in an indictment on which he was a witness, was relevant in order to show a motive for the commission of the crime for which they were on trial. In criminal cases "the prosecution has the right to offer evidence which tends to prove the motive in a defendant for the commission of the crime for which he is indicted." (American and English Encyclopedia of

Law, vol. 15, citations under note 11, page 937.) "Evidence is not incompetent when it is introduced for the purpose of showing a motive for the crime charged, because it may tend to show that the accused is guilty of another offense than the one for which he is indicted." (American and English Encyclopedia of Law, vol 15, page 938.) This evidence was competent because it went directly to the motive which instigated the plaintiffs in error in the commission of the offense for which they were on trial. Thompson had reported them for illicit distilling. He was a witness on an indictment which was pending against them in the United States court for illicit distilling. It was, therefore, competent to show the fact that these parties had engaged in illicit distilling, and this at once furnished a motive for the conspiracy against Thompson.

IX and X. *The admission as evidence on the trial of the testimony given by William Robert Taylor against the plaintiffs in error upon the preliminary trial before United States Commissioner Wilson in this case.*

Upon complaint duly made a warrant was issued in August, 1898, for the arrest of William Robert Taylor, Columbus W. Motes, John Littlejohn, and Dodge Blankenship, on the charge of conspiracy and the murder of W. A. Thompson, and on the 19th day of August, 1898, the preliminary hearing was in progress before United States Commissioner Wilson, before whom the warrant had been returned. William Robert Taylor, one of the accused, voluntarily became a witness for the prosecution and was examined. During his examination he implicated in the crime Columbus W. Motes, John Littlejohn,

and Dodge Blankenship, who were then under arrest and present, and also implicated Walter W. Motes and Jasper Robinson, who were present, having been brought to the hearing as witnesses for the Government. Thereupon Walter W. Motes and Jasper Robinson were arrested and the examination of Taylor as a witness proceeded with. Counsel for C. W. Motes, Littlejohn, and Blankenship was present and cross-examined Taylor; and Walter W. Motes and Robinson were also present during this cross-examination and had the opportunity themselves to cross-examine Taylor. (See evidence of B. W. Bell, Record, pp. 17, 18, and testimony of H. A. Wilson, commissioner, Record, pp. 18, 19.) The evidence of William Robert Taylor taken before the commissioner was reduced to writing and signed by him, and will be found in the record beginning on page 19. When the case came on for trial in the circuit court, it was upon the indictment against C. W. Motes, Walter W. Motes, William R. Taylor, Jasper Robinson, John Littlejohn, and Mark Blankenship. When the parties were brought in to be arraigned, William Robert Taylor entered a plea of guilty and the others, severally, the plea of not guilty. (Record, p. 30.) The trial was then proceeded with as to the persons named in the indictment who had entered the plea of not guilty. William Robert Taylor was under subpoena as a witness for the prosecution and was also in the list of witnesses for the prosecution served upon the plaintiffs in error (record, pp. 7, 8). Taylor was released from prison and was put in charge of a man by the name of Ed. May, with instructions to let Taylor stay at the hotel at night

with his family. It appears that Taylor remained at the hotel two nights and then absconded, and, when called as a witness, he failed to respond. Efforts were made through the United States marshal and his deputies, as well as the State officers, to ascertain the wherabouts of Taylor and produce him in court, but he could not be found. See testimony before the court of United States marshal and deputy sheriff (record, p. 18); also testimony of H. A. Wilson as to circumstances under which Taylor was examined on preliminary hearing beginning on page 18 of record.

The United States attorney then offered to introduce the statement of the testimony of William Robert Taylor taken before the commissioner, as evidence for the prosecution. Objection by counsel for plaintiffs in error. The court ruled the testimony competent, and an exception was noted. As to the admissibility of this evidence I content myself with citing authorities which are furnished me by the United States attorney who represented the prosecution in the trial. (*Lowe* v. *State*, 86 Ala., 51; *Pruitt* v. *State*, 92 Ala., 41; *Reynolds* v. *United States*, 98 U. S., 145; Wharton's Crim. Ev., 8th ed., sec. 229.) From the testimony of the officers produced by the United States attorney, it appears that Taylor absconded, and after the exercise of due diligence he could not be found within the district. It is insisted that under these circumstances the court had a right to assume that he was beyond its jurisdiction and indefinitely absent therefrom.

XI. *Objection to the testimony of Mary Taylor to the*

effect that she had heard Columbus W. Motes and William Robert Taylor agree to kill Thompson.

The objection is based upon the ground that Mary Taylor is the wife of William Robert Taylor, and therefore incompetent to testify against his accomplices.

Taylor had already entered his plea of guilty, and the testimony of his wife could in no way affect him. She was not a witness against her husband. It is true that the general rule is that on a trial for conspiracy the wife of one of the defendants is not allowed to testify against one of the others as to any act done by him in furtherance of the common design, if there be any evidence connecting the husband with the defendants in the general conspiracy. It is obvious that this rule is not intended to apply in a case like the present, for the husband had, himself, already become a witness, had made a confession admitting his own guilt, and had gone further and entered a plea of guilty to the indictment. He was not on trial at all, and nothing that the wife could have said would have had any bearing so far as his guilt or innocence was concerned. "The rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife." (Wharton's Crim. Ev., 8th ed., secs. 390, 391, 392.)

XII. *Exception because the jury were allowed to examine certain substances alleged to be human blood and brains.*

A shoe was produced on the trial which was shown to be one worn by Columbus W. Motes about the time Thompson was killed, and afterwards found near Motes's house. On the shoe were certain deposits which Dr.

J. E. Pearson, an expert witness for the prosecution, testified were particles of human blood and brains. The district attorney then offered to let the jury examine the particles on the shoe through a microscope, which was admitted by the court and excepted to by the plaintiffs in error. It is a settled rule of law that it is competent to introduce on a trial, for inspection by the jury, all instruments by which an offense is alleged to have been committed; all clothes of parties from which inferences may be drawn, and all materials in any way a part of the res gestæ. (Wharton's Crim. Ev., 8th ed., secs. 311, 312, et seq.) The shoe had been identified as one worn by Motes. The expert witness had testified that the particles found upon it were human blood and brains. Under these circumstances it was competent for the jury to have the benefit of an inspection of the shoe and the particles found upon it.

XIII. *Objection to allowing the district attorney to cross-examine plaintiffs in error when on the stand as witnesses for themselves as to whether or not they had been guilty of illicit distilling previous to the time Thompson was killed.*

I do not think this proposition needs argument. The plaintiffs in error went upon the stand voluntarily as witnesses and as such they were subject to the ordinary rules of cross-examination. The district attorney had the right to test their credibility by inquiring of them as to their previous conduct. If his interrogatories were such as tended to criminate them, they had the constitutional right to decline to answer on that ground.

XIV. *Error is assigned because the court overruled the motion for arrest of judgment.*

The motion in arrest was based upon the same grounds as are assigned for error and is simply a reiteration of the several questions involved in the case here.

XV–XXVIII. *Exceptions 25 to 28, inclusive, are based upon requests for special instructions to the jury.*

No part of the charge of the court to the jury is given in the record, so it is impossible to know here what the charge was. I have the right to assume that the court referred in some way in its charge to the jury to the several requests made by the plaintiffs in error, and in preparing the bill of exceptions it would have been fair to the defendant in error to have given what the court did charge relative to the several points involved in the requests for special instruction. Not only is the record silent as to the judge's charge, but counsel for plaintiffs in error does not produce any part of it in his brief of argument. We are, therefore, confronted by a number of abstract propositions, the bulk of which are wholly untenable as propositions of law, without an opportunity to examine the charge of the court and see if it did not declare the law in this case properly.

There are four of the special requests for instructions, namely, 20, 21, 26, and 27, which refer to the citizenship of Thompson, the deceased. The last two seem to be based upon conditions concerning which there was no evidence. I do not find in the record any testimony that Thompson had ever been convicted of any offense whatever, either against the United States or any State in the Union, or that he had been guilty of any act which deprived him of his rights and privileges under the Con-

stitution and laws of the United States. My contention is that if Thompson was beyond the pale of protection of the laws of the United States, such was a matter of defense, and the burden was upon the plaintiffs in error to show it.

XXIX. The twenty-ninth assignment of error is as follows: "The sentence is illegal."

I think that there may be something in this assignment, because, according to a view which I have before presented, there is a question as to whether the court could sentence the plaintiffs in error for life, instead of inflicting the punishment of death. If the court did not enter the judgment which the law required, then it is true that the sentence is illegal.

There is one phase of this case which I must admit is somewhat novel, and that is in relation to Columbus W. Motes, one of the plaintiffs in error. Whatever may have been the result as to the other plaintiffs in error of any error committed during the trial, either in the admission of testimony or the charge to the jury, it is impossible for me to see how any right which Columbus W. Motes was entitled to could be at all affected. The jury was not compelled to rely upon the testimony of a single witness aside from Columbus W. Motes himself in order to render a verdict of guilty as to him. He went voluntarily upon the stand as a witness for the defendants in the trial, and I give his testimony in full as taken from the record, beginning on page 25:

> My name is Columbus W. Motes; I am about 30 years old; I know the defendants, who are on trial for the murder of W. A. Thompson; I knew Thomp-

son, and know when and where he was killed; I also know who killed him.

He was killed on March 14 last, near his home, by myself and William Robert Taylor. No other person had anything whatever to do with it. I went to Taylor's house on March 13, 1898, just after he had returned from Birmingham, where he had been attending the United States court as defendant. We were both under indictment in the United States court at Birmingham for illicit distilling. Taylor attended court and I did not. W. A. Thompson was a witness against both of us, but I did not know who reported us. Taylor told me on the 13th of March, the day he got home from the United States court at Birmingham, that he got our cases continued on March 12, 1898, until the next term of the court. We then and there agreed to kill Thompson to keep him from appearing as a witness against us at the next term of the court. We agreed to kill him on the next day as he came from Sylacauga, so the neighbors would think he was killed by Dodge Blankenship and Ad Smith, who only a few days before that time had been arrested and bound over for illicit distilling.

We took my gun, a rifle, and went to the place where we knew Thompson would pass and waited until he came along. Taylor shot him three times with the rifle. I was watching, according to the agreement between us, to see if any person saw us. The third shot is the one that killed him. The bullet entered his forehead. After we killed him, which was about the middle of the evening, we got his money out of his pockets, $18 all in two-dollar bills, and the next morning we hid it in a tree near Taylor's house.

Neither John Littlejohn, Dodge Blankenship, Walter Motes, or Jasper knew anything about our

plans to kill Thompson, were not present when he was killed, and had nothing whatever to do with the murder.

Now, what difference does it make, so far as this plaintiff in error is concerned, as to the testimony introduced on the part of the prosecution, whether it was competent or incompetent; because he admits in his own sworn statement, when being examined as a voluntary witness, that he and Taylor entered into the conspiracy to murder Thompson and that they did murder him. In this situation the court was not required to give the jury any special instructions as to Columbus W. Motes, based upon exceptions to testimony of other witnesses, or any special instructions upon particular principles of the law as applicable to his case. The court would have committed no error if it had said to the jury, that if they believed the testimony of Motes himself, he was guilty as charged in the indictment.

JAS. E. BOYD,
Assistant Attorney-General.

O

MOTES *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 257. Submitted April 23, 1900. — Decided May 21, 1900.

By the Revised Statutes of the United States it is provided: "§ 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States. § 5509. If in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offence is committed." Several persons were indicted under the above provisions in the Circuit Court of the United States for the Northern District of Alabama for the crime of murder committed in execution of a conspiracy to injure, oppress, threaten and intimidate one Thompson because of his having informed the United States authorities of violations by the conspirators of the laws of the United States relating to distilling. In Alabama murder in the first degree is punishable by death or imprisonment for life at the discretion of the jury. At the preliminary trial before a United States commissioner, Taylor, one of the accused, testified and his evidence was put in writing and signed by him. It was sufficient, if accepted, to estab-

lish the guilt of all the defendants. The accused had opportunity to cross-examine him. At the final trial in the Circuit Court, Taylor, who had pleaded guilty, was called as a witness for the Government, but did not respond. He had disappeared, although seen in the corridor of the court-building about an hour before being called. His absence was not by the procurement or advice of the accused, but was due to the negligence of the officers of the Government. The court, over the objections of the accused, allowed Taylor's written statements made under oath at the examining trial to be read in evidence to the trial jury. The accused were found guilty as charged in the indictment and sentenced to the penitentiary for life. At the trial one of the accused testified and stated that he and Taylor committed the murder, and that the other defendants knew nothing of it and had nothing to do with it. *Held:*

(1) That no constitutional objection could be urged against sections 5508 and 5509;

(2) That under the act of January 15, 1897, c. 29, 29 Stat. 487, the Circuit Court could not have imposed the penalty of death for the offence charged, but only imprisonment for life;

(3) That under the Circuit Court of Appeals Act, 1891, any criminal case involving the construction or application of the Constitution of the United States, can be brought after final judgment directly to this court from the Circuit Court;

(4) That the admission as evidence of the written statements made by Taylor at the examining trial was in violation of the rights of the accused under the clause of the Sixth Amendment to the Constitution of the United States declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witness against him;

(5) That the defendant who testified under oath as to his guilt, and whose testimony was sufficient to convict him, independently of Taylor's written statement at the examining trial was not entitled to a reversal for the error committed in allowing that statement to be read, because it could not have prejudiced him.

THE case is stated in the opinion of the court.

Mr. Lee Cowart for plaintiff in error.

Mr. Assistant Attorney General Boyd for the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

Columbus Winchester Motes, alias Chess Motes, Walter W. Motes, William Robert Taylor, Jasper Robinson, John Little-

john and Mark Grant Blankenship were indicted in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama under sections 5508 and 5509 of the Revised Statutes of the United States.

Those sections are as follows:

"5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

"§ 5509. If in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offence is committed."

The first count of the indictment charged in substance that on the 14th day of March, 1898, and within the jurisdiction of the court, the persons above named conspired to injure, oppress, threaten and intimidate one W. A. Thompson, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he had about the 2d day of October, 1897, informed one Robert A. Moseley, United States commissioner for the Northern District of Alabama, that Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson and Walter Motes had about the months of July, August, September, October, November and December, 1895, violated the internal revenue laws of the United States by unlawfully carrying on the business of distillers without having given bond, as required by law, and having in their possession and custody and under their control

a still and distilling apparatus set up without having the same registered. It was also charged that in furtherance of the conspiracy so formed and to effect the object thereof the accused "did on, to wit, about the 14th of March, eighteen hundred and ninety-eight, go upon the highway and did then and there, in the county of Talladega, in the State of Alabama, in the southern division of the Northern District of Alabama, and within the jurisdiction of said court, unlawfully, wilfully, premeditatedly, deliberately and with malice aforethought kill and murder the said W. A. Thompson by shooting him with a gun or guns, because he, the said W. A. Thompson, had reported to the said Robert A. Moseley, United States Commissioner as aforesaid, said violation of the internal revenue laws of the United States by the said Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson and Walter Motes, as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

The third count differed from the first one only in charging a conspiracy, formed by the same persons, to injure, oppress, threaten and intimidate Thompson because of his having, about March 8, 1898, informed a deputy collector of internal revenue that Mark Grant Blankenship had, about the above date, carried on the business of distiller in violation of law; also, that to effect the object of that conspiracy, and because of Thompson having given such information to the deputy collector of internal revenue, that the accused had unlawfully, wilfully, premeditately, deliberately and with malice aforethought, killed and murdered him.

There are seven counts in the indictment, but the first and third are sufficient to show the nature of the charges against the accused and to bring out the questions disposed of by this opinion.

It is recited in the bill of exceptions that Taylor pleaded guilty, but the transcript does not contain any entry of record showing such to be the fact.

The jury found the "defendants Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn and Mark Grant Blankenship guilty as charged in the indictment," and

in their verdict asked "the mercy of the court for the four defendants, Walter W. Motes, Jasper Robinson, John Littlejohn, Mark Blankenship, and especially for John Littlejohn and Jasper Robinson."

Motions in arrest of judgment and for new trial were overruled, and judgment was entered upon the verdict, sentencing the defendants other than Taylor to imprisonment in the penitentiary for life.

We have seen that by section 5508 of the Revised Statutes it is made an offence against the United States for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States—the punishment prescribed being a fine of not more than $5000, imprisonment not more than ten years and ineligibility to any office or place of honor, profit or trust created by the Constitution or laws of the United States. And by section 5509 it is provided that if in committing the above offence any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offence is committed.

No question has been made—indeed none could successfully be made—as to the constitutionality of these statutory provisions. *Ex parte Yarborough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76. Referring to those provisions and to the clause of the Constitution giving Congress authority to pass all laws necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested in the Government of the United States, or in any department or officer thereof, this court has said: "In the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution." *Logan* v. *United States*, 144 U. S. 263, 283, and authorities there cited. It was the right and privilege of Thompson, in return for the protection he enjoyed under the Constitution and laws of the United States, to

aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States. And it was competent for Congress to declare a conspiracy to injure, oppress, threaten or intimidate a citizen because of the exercise by him of such right or privilege to be an offence against the United States.

The reference in the above sections to the laws of the State in which the offence was committed makes it necessary to ascertain from the laws of Alabama what punishment could be inflicted for the crime that was committed while the conspiracy referred to in section 5508 was being carried into execution.

By the Code of Alabama it is provided (c. 158): "§ 4854. Every homicide, perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." "§ 4857. When the jury find the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly. § 4858. Any person, who is guilty of murder in the first degree, must, on conviction, suffer death or imprisonment in the penitentiary for life, at the discretion of the jury; and any person who is guilty of murder in the second degree must, on conviction, be imprisoned in the

penitentiary for not less than ten years, at the discretion of the jury." Alabama Code (1896), vol. 2, Criminal.

Taking these statutory provisions together, the question arises whether the court below had authority, in view of the verdict of the jury—"guilty as charged in the indictment"—to sentence the accused to imprisonment in the penitentiary for life. The contention of the accused is that it was for the jury to indicate by their verdict the punishment to be imposed by the court, and that the court was without power to act until the jury indicated the degree of the crime committed.

It is true that the crime charged against the accused was what is made by the laws of Alabama murder in the first degree, such offence being punishable with death or imprisonment in the penitentiary for life. And in that State it is the duty of the jury to ascertain by their verdict whether the offence charged was murder in the first or second degree. As therefore under the laws of Alabama, it was in the discretion of the jury, and not for the court, to say whether murder in the first degree should be punished by death or by imprisonment for life, and as the verdict of the jury did not indicate the mode of punishment, there would have been some difficulty in giving effect to that clause of section 5509 of the Revised Statutes of the United States, subjecting the accused to such punishment as is attached by the laws of the State in which the offence is committed, but for recent legislation by Congress.

The legislation to which we refer is found in sections one, two and three of the act of January 15, 1897, c. 29, which provides: "§ 1. That in all cases where the accused is found guilty of the crime of murder or of rape under sections 5339 or 5345, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life. § 2. That except offences mentioned in sections 5332, 1342, 1624, 5339 and 5345, Revised Statutes, when a person is convicted of any offence to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life, and when any person is

convicted of an offence to which the punishment of death, or a lesser punishment, in the discretion of the court, is affixed, the maximum punishment shall be imprisonment at hard labor for life. § 3. That the punishment of death prescribed for any offence specified by the statutes of the United States, except in sections 5332, 1342, 1624, 5339 and 5345, Revised Statutes, is hereby abolished, and all laws and parts of laws inconsistent with this act are hereby repealed." 29 Stat. 487.

It will be observed that by section 3 of this act (which is the latest statute on the subject) the death penalty is abolished in all cases of offences against the United States except those referred to in certain sections which do not embrace the present case. It was not therefore in the power of the court below to have sentenced the plaintiffs in error to suffer death for the crime of murder committed in the prosecution of the conspiracy which is made by section 5908 an offence against the United States. But we are to determine the scope of section 5509 in connection with the act of 1897. Under that act the punishment of death could not be inflicted except in the cases specified. So that section 5509 is to be enforced as if it declared that the offence therein prescribed should be punished in such mode as was consistent with the laws of Alabama, provided—such is the effect of the act of Congress of January 15, 1897—the accused should not for any offence covered by that section be subjected to the penalty of death. The provision in the Code of Alabama giving the jury discretion to affix the punishment of death or imprisonment for life in cases of murder in the first degree can have no application here, because the act of 1897 forbade the former mode of punishment in such a case as the present one. When, therefore, the jury found the defendants guilty as charged in the indictment, they found them guilty of what, under the laws of Alabama, was murder in the first degree, and they were sentenced by the Circuit Court of the United States to suffer imprisonment for life which those laws authorized in cases of that character. This was a substantial compliance with the provisions of sections 5508 and 5509 of the Revised Statutes.

It results that the Circuit Court imposed the only punishment

authorized by the laws of the United States for the crime of which the defendants were found guilty.

To avoid misapprehension it should be said in this connection that the Circuit Court had no jurisdiction of this case simply as one of murder committed within the limits of the State, but only as one of conspiracy, under the act of Congress, accompanied by murder.

The Assistant Attorney General suggests as worthy of consideration whether, under this interpretation of the statutes, the present case can be brought here directly from the Circuit Court. This suggestion is based upon the provision in the act of January 20, 1897, c. 68, which withdraws from the consideration of this court, upon appeal or writ of error direct from the Circuit Court, cases of conviction of infamous crimes not capital, and gives jurisdiction in such cases, upon appeal or writ of error, only to the proper Circuit Court of Appeals; and it is assumed that no criminal case can, upon any ground, be brought here directly from a Circuit Court of the United States, unless it be a case of conviction of a capital crime. 29 Stat. 492. But such is not the law. Among other cases, this court, under the act of March 3, 1891, 26 Stat. 826, c. 517, establishing Circuit Courts of Appeals, can take cognizance of a criminal case, upon writ of error to review the judgment of a Circuit Court, when the case really "involves the construction or application of the Constitution of the United States." That act does not make a distinction between civil and criminal causes such as is implied by the above suggestion of the Government. At the present term of this court we have taken cognizance of a criminal case involving a misdemeanor, brought here directly from a Circuit Court of the United States. *Rider et al.* v. *United States*, *ante*, 251. And we had previously in *United States* v. *Rider*, 163 U. S. 132, 138, said: "By section six [of the Circuit Court of Appeals Act] the judgments or decrees of the Circuit Courts of Appeals were made final 'in all cases arising under the criminal laws,' and in certain other classes of cases, unless questions were certified to this court or the whole case ordered up by writ of certiorari as therein provided. *American Construction Co.* v. *Jacksonville Railway Co.*,

158 U. S. 372, 380. Thus appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the Circuit Court of Appeals, and in all civil cases by appeal or writ of error without regard to the amount in controversy, except as to appeals or writs of error to or from the Circuit Courts of Appeals in cases not made final as specified in § 6." We further said in that case that the object of the act of March 3, 1891, c. 517, was to distribute between this court and the Circuit Courts of Appeals the entire appellate jurisdiction over the Circuit Courts of the United States.

The present case does involve the construction and application of the Constitution of the United States. It is necessary to determine whether the admission of certain testimony was not an infringement of rights secured to the accused by the Sixth Amendment of the Constitution, declaring that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

It appears from the bill of exceptions that the Government offered to read to the jury the written statement of William Robert Taylor, taken in a preliminary examination before United States Commissioner Wilson of the case of the United States against Columbus W. Motes, William Robert Taylor, John Littlejohn and Dodge Blackenship. For the purpose of "laying a predicate" for offering that statement in evidence, Captain B. W. Bell was examined. He testified "that he was a special officer of the Department of Justice; that he had been engaged in working up the cases against these defendants and preparing them for trial; that in August, 1898, he caused the arrest of said William Robert Taylor and also Columbus W. Motes, John Littlejohn and Dodge Blankenship, on a charge of conspiracy and murder of W. A Thompson, and that on the 19th day of August, 1898, during and on the second day of their preliminary trial, one of the defendants, William Robert Taylor, voluntarily became a witness for the prosecution, and made a statement implicating in said murder Columbus W. Motes, John Littlejohn and Dodge Blankenship, who were at that time having their preliminary hearing before said commissioner, and also implicating in said murder Walter W. Motes and Jasper Rob-

inson, who had been brought to said preliminary trial as witnesses for the Government, and that on the second day of said preliminary trial he (Bell) caused the arrest of the said Walter W. Motes and Jasper Robinson; that Taylor and the other three defendants on trial with him were held for trial by the commissioner and committed to jail without bail to await trial, and that since that time the said Taylor has been confined in the Jefferson County, Alabama, jail under commitment issued by said commissioner; that after the beginning of the present trial on the 20th of September, 1898, he went to the jail, took said Taylor into his custody more than two days before said Taylor escaped, and that said Taylor had not been in jail since, but that he had placed him in charge of one Ed. May, a witness for the Government in this case, and instructed May to let Taylor stay at the hotel at night with his family, and that in pursuance of said instruction Taylor remained at the hotel Tuesday night and Wednesday night before he absconded on Thursday; that he saw Taylor in the corridors of the court room about 10 o'clock A. M. Thursday, before he was called as a witness, about 11 o'clock the same day, and that when Taylor failed to respond he made a search for him in the city of Birmingham, and telegraphed to several places, and could not find him or learn anything at all as to his whereabouts." Bell further testified that on the preliminary trial before H. A. Wilson, United States commissioner, "Walter W. Motes and Jasper Robinson were arrested during the trial of the other defendants, Columbus W. Motes, John Littlejohn and Dodge Blankenship, said Taylor having implicated them in his testimony upon said trial. The defendants were all represented upon said preliminary trial by Mr. Lee Cowart. Mr. Cowart cross-examined the witness, as shown in the testimony; that all of the defendants, including the said Walter W. Motes and Jasper Robinson, had an opportunity to cross-examine the said witness Taylor, and he, in fact, was cross-examined by Mr. Cowart, acting either as attorney for Columbus W. Motes, John Littlejohn and Dodge Blankenship, or for all the defendants; that said cross-examination was reduced to writing; that he (said Bell) had never made or offered the said Taylor any inducements, promises, reward or

hope, to induce him to make said statement; that before said Taylor was examined as a witness on the said preliminary trial he was taken to the office of the United States attorney, who cautioned him to make no statement unless it was purely voluntary, and told him emphatically that he could make no promise and offer him no hope whatever, and that said Taylor stated that he made the statement voluntarily and to relieve his own mind."

The United States marshal testified on behalf of United States that he had instructed his deputies that Taylor had escaped; that he had offered a reward of two hundred dollars for his arrest; that he had made diligent search in the city of Birmingham for Taylor, and could not learn anything as to his whereabouts. The chief of police of the city of Birmingham testified that he had not been officially notified that Taylor had escaped, but that he had seen something concerning it in the newspapers, and that he had made no special effort to arrest him and had no information as to his whereabouts. The United States then offered as a witness a deputy sheriff, who testified that the sheriff of Jefferson County and his deputies had been on the lookout for Taylor ever since his absence was known; that they had had photographs taken of him and sent them to various places, and that the deputies had been on the lookout for him all over Birmingham and other parts of Jefferson County, and that they had been unable to find him anywhere.

The Government introduced as a witness H. A. Wilson, who testified as follows: "I am a United States commissioner and held the preliminary trial in the case against these defendants on the 18th and 19th days of August, 1898. The defendants Columbus W. Motes, William Robert Taylor, John Littlejohn and Dodge Blankenship were brought before me upon a warrant issued on affidavit before United States Commissioner R. A. Moseley, Jr., by special officer Bell. Jasper Robinson and Walter W. Motes were present in court while the case was being heard. William Robert Taylor, one of the defendants, during the trial proposed to make a statement in the nature of a confession. I cautioned him, and told him that he could not be made to testify unless he chose to do so, and asked him if

any inducement or promise had been made or offered to him. He said there had not; that the statement was voluntary, and he made it to relieve his mind. Walter W. Motes and Jasper Robinson were present in court as defendants at the time, as well as the other defendants who were on trial. I swore William Robert Taylor as a witness, administering to him the usual oath. He was then examined, and his testimony was committed to writing. I identify this statement (referring to the evidence of Taylor here handed to the witness) as the evidence taken before me. In his testimony, as is shown and as was the fact, he implicated the defendants Jasper Robinson and Walter W. Motes, who were arrested then and there. The defendants Columbus W. Motes, Blankenship and Littlejohn were represented by Mr. Cowart, and so were the defendants Walter W. Motes and Jasper Robinson as soon as they were arrested, and the trial of the four defendants then on trial, to wit, Columbus W. Motes, William Robert Taylor, John Littlejohn and Dodge Blankenship, was proceeded with and concluded in the presence of the defendants Jasper Robinson and Walter W. Motes. Mr. Cowart, as a matter of fact, did cross-examine the witnesses, as is shown by this testimony and as I recollect it, and all of the defendants, including Walter W. Motes and Jasper Robinson, were allowed by me an opportunity to cross-examine, although no separate trial was had, and all of these were examined without bail."

The testimony or statement given by Taylor at the preliminary trial of part of the defendants was then read in evidence by the Government, the accused objecting on the ground that a sufficient predicate had not been made for its introduction; but the objection was overruled and an exception taken. The defendants Walter W. Motes and Jasper Robinson severally objected to the reading of Taylor's statement against them on the ground that they were not on preliminary trial at the time the testimony was taken, were not parties to the case then being tried, and had not legally been called upon to cross-examine the witness. Those objections were also overruled, and an exception was taken.

Taylor's statement was lengthy, and showed a cross-examina-

tion or an opportunity for the cross-examination of Taylor by the present defendants. It was quite sufficient, if accepted by the jury as true, to establish the guilt of some if not of all the accused. It is important to observe that at the time Taylor's statement was offered in evidence there had been no proof whatever of the conspiracy charged. Conspiracy was the basis of the prosecution; for in the absence of a conspiracy, in the carrying out of which the alleged murder was committed, the prosecution must have failed; the crime of murder, apart from the conspiracy to deprive a citizen of a right or privilege secured by the Constitution and laws of the United States, being punishable only by the State.

We are of opinion that the admission in evidence of Taylor's statement or deposition taken at the examining trial was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the Government. Taylor was a witness for the prosecution. He had been committed to jail without bail. We have seen that the official agent of the United States in violation of law took him from jail after the trial of this case commenced, and, strangely enough, placed him in charge not of an officer but of another witness for the Government with instructions to the latter to allow him to stay at a hotel at night with his family. And on the very day when Taylor was called as a witness, and within an hour of being called, he was in the corridor of the court house. When called to testify he did not appear.

In *Reynolds* v. *United States*, 98 U. S. 145, 158, 159, which was an indictment for bigamy committed in Utah—the prosecution being under section 5352 of the Revised Statutes of the United States—the trial court admitted proof of what a witness had stated on a former trial of the accused for the same offence but under a different indictment. This court said: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot

complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." In that case reference was made to several authorities, American and English, and the court further said: "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony."

In his Treatise on Constitutional Limitations, Cooley, after observing that the testimony for the people in criminal cases can only, as a general rule, be given by witnesses in court, at the trial, says: "If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party." Cooley's Const. Lim. (2d ed.) *318.

In *Regina* v. *Scaife*, 2 Den. Cr. C. 281; 285, 286; *S. C.* 17 Q. B. 238; 5 Cox Cr. C. 243, which was an indictment against three persons for a felony, it appeared that a witness had been kept out of the way by the procurement of one of the accused, and the question was whether the prosecution could use the deposition of the absent witness taken before magistrates in the mode directed by 11 & 12 Vict. c. 42, § 17. It was held by all the judges that the deposition was not admissible against a defendant who had not caused the absence of the witness. Lord Campbell, C. J., said: "I am of opinion that the rule for a new trial must be made absolute. Evidence having been given that the defendant Smith had resorted to a contrivance to keep the

witness out of the way, the deposition was admissible against him; but it was not admissible against the other defendants, there being no evidence to connect them with the contrivance. The learned judge, Cresswell, J., in his summing up to the jury, seems to have made no distinction as to the duty of the jury to consider the deposition of the absent witness as evidence against the defendant Smith alone, and not as against the others. The question then is, whether such a deposition is admissible against a prisoner without proof that the deponent has been kept away by his contrivance or without proof of the death of the witness. No case has yet gone so far; and I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having a witness for the prosecution against him examined and cross-examined before the jury, upon every matter that may be material to his defence. I, therefore, think that the deposition was improperly admitted against Scaife and Rooke, and that there should be a new trial." Patteson, J.—"The deposition of the absent witness, Sarah Ann Garnett, was admissible as against the defendant Smith, by whose contrivance she was kept out of the way, but it ought to have been applied to the case against him only, and not to the case against the other prisoners. No such distinction appears to have been made at the trial, but the evidence was allowed to go to the jury generally against all the prisoners, it being assumed, without any evidence whatever to support the assumption, that they all were connected with the contrivance to keep the witness out of the way." Coleridge, J.—"Before the enactment of 11 & 12 Vict. c. 42, I always understood the law was, that if a witness were absent, either by reason of the death of the witness, or by the procurement of the prisoner, the deposition was receivable in evidence against him. But I believe these were the only two cases where the absence of a witness let in his depositions. Absences from every other cause were within the same category, and did not render them admissible. The seventeenth section of the recent statute took another case—where a witness was proved to be so ill as to be unable to travel—out of one category and put it into another."

In the present case there was not the slightest ground in the

evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement or with the assent of either of the accused. Nor (if that were material) did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the State and was permanently beyond the jurisdiction of the court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution. The case is not within any of the recognized exceptions to the general rule prescribed in the Constitution.

It is suggested that the action of the Circuit Court was in harmony with the decisions of the Supreme Court of Alabama. *Lowe* v. *State*, 86 Ala. 47; *Pruitt* v. *State*, 92 Ala. 41. We have examined the cases in that court to which attention has been called, and do not think they sustain the ruling of the court below under the circumstances disclosed by this record. But the question cannot be made to depend upon the rules of criminal evidence prevailing in the courts of the State in which the crime was committed. It must be determined with reference to the rights of the accused as secured by the Constitution of the United States. That instrument must control the action of the courts of the United States in all criminal prosecutions before them. We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution. We need not decide more in the present case.

For the error referred to the judgment of the Circuit Court must be reversed as to all the plaintiffs in error and a new trial awarded, except as to Columbus W. Motes. The case as to him rests upon peculiar grounds, because of his testimony on behalf of the accused at the final trial. He testified: "My name is Columbus W. Motes; I am about thirty years old. I know the defendants who are on trial for the murder of W. A.

Thompson; I knew Thompson, and know when and where he was killed; I also know who killed him. He was killed on March 14th last, near his home, by myself and William Robert Taylor. No other person had anything whatever to do with it. I went to Taylor's house on March 13th, 1898, just after he had returned from Birmingham, where he had been attending the United States court as defendant. We were both under indictment in the United States court at Birmingham for illicit distilling. Taylor attended court and I did not. W. A. Thompson was a witness against both of us, but I did not know who reported us. Taylor told me on the 13th of March, the day he got home from the United States court at Birmingham, that he got our cases continued on March 12th, 1898, until the next term of the court. We then and there agreed to kill Thompson to keep him from appearing as a witness against us at the next term of the court. We agreed to kill him on the next day as he came from Sylacauga, so the neighbors would think he was killed by Dodge Blankenship and Ad Smith, who only a few days before that time had been arrested and bound over for illicit distilling. We took my gun, a rifle, and went to the place where we knew Thompson would pass and waited until he came along. Taylor shot him three times with the rifle. I was watching, according to the agreement between us, to see if any person saw us. The third shot is the one that killed him. The bullet entered his forehead. After we killed him, which was about the middle of the evening, we got his money out of his pockets, eighteen dollars, all in two-dollar bills, and the next morning we hid it in a tree near Taylor's house. Neither John Littlejohn, Dodge Blankenship, Walter Motes or Jasper knew anything about our plans to kill Thompson, were not present when he was killed, and had nothing whatever to do with the murder."

In this evidence the jury had conclusive proof of the guilt of Columbus W. Motes of the crime charged in the indictment. The admission of the statement of Taylor in evidence was, therefore, of no consequence as to him; for in his own testimony enough was stated to require a verdict of guilty as to him, even if the jury had disregarded Taylor's statements

altogether. We can therefore say, upon the record before us, that the evidence furnished by Taylor's statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of the judgment as to him. It would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him.

It is proper to say that there are other questions of a serious character raised by the assignment of errors. But as those questions may not arise upon another trial, we do not now consider them.

The judgment as to Columbus Winchester Motes is affirmed, but the judgment as to all the other plaintiffs in error is reversed, with directions to grant a new trial and for further proceedings consistent with this opinion.